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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 1056. ~~621~~ ~~381~~ 104.

R. H. PAUL, APPELLANT,

vs.

HENRY B. CULLUM.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

FILED OCTOBER 2, 1886.

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1 In the supreme court of the Territory of Arizona. H. B. Cullum, plaintiff, *vs.* R. H. Paul, defendant. Transcript on appeal. Ben. Morgan, attorney for appellant. Earll & Campbell, attorneys for respondent.

Endorsed: Filed Dec. 9th, A. D. 1884. William Wilkerson, clerk.

2 In the District Court of the First Judicial District, in and for the County of Pima, Territory of Arizona.

H. B. CULLUM, Plaintiff, *vs.* R. H. PAUL, Defendant.

The plaintiff above named complains of the above-named defendant and alleges—

I.

That on the 28th day of October, 1881, at the city of Tucson, county of Pima, the plaintiff was the owner and in the possession of the following goods, wares, and merchandise, situated and then being in the store-rooms on Congress street, in the said city of
3 Tucson, formerly occupied by Messrs. Lord and Williams Company, and being those certain goods, wares, and merchandise inventoried and scheduled by H. B. Cullum, the plaintiff herein, and which said goods, wares, and merchandise are of the value of thirty-five thousand dollars.

II.

That the defendant, on the 28th day of October, 1881, at the said city of Tucson, without the consent, and wrongfully took said goods, wares, and merchandise from the possession of the plaintiff.

III.

That before the commencement of this action, to wit, on the 28th day of October, 1881, the plaintiff demanded of the defendant possession of the said goods, wares, and merchandise.

IV.

That defendant still wrongfully and unlawfully withholds and detains said goods, wares, and merchandise from the possession of the plaintiff.

Wherefore plaintiff demands judgment against the defendant for the recovery of the possession of said goods, wares, and mer-
4 chandise, or for the sum of thirty-five thousand dollars, the value thereof, in case delivery cannot be had.

EARLL, SMITH, CAMPBELL & ROBINSON,
Attorneys for the Plaintiff.

(Endorsed:) Filed Nov. 8th, 1881. G. A. Clum, clerk.

Summons.

(Title of Court and Cause.)

Action brought in the district court of the first judicial district, in and for the county of Pima, in the Territory of Arizona.

The Territory of Arizona sends greeting to R. H. Paul:

You are hereby summoned and required to appear in an action brought against you by the above-named plaintiff in the district court of the first judicial district in and for the county of Pima, in the Territory of Arizona, and answer the complaint filed with the clerk of this court at Tuscon, in said county (a copy of which complaint accompanies this summons), within twenty days (exclusive of the day of service) after the service upon you of this summons, if served in this county; but if served out of the county and within this district, then within thirty days; in all other cases, forty days. This said
5 action is brought by plaintiff to recover of defendant certain goods, wares, and merchandise wrongfully detained, or for the sum of thirty-five thousand dollars, the value thereof, as will more fully appear by reference to the complaint on file herein. And you are hereby notified that if you fail to appear and answer the complaint as above required the plaintiff will take default and apply to the court for the relief therein demanded and costs and disbursements in this behalf expended.

Given under my hand and the seal of the said district court, at Tuscon, this 8th day of November, A. D. 1881.

[SEAL.] GEORGE A. CLUM, *Clerk.*

OFFICE OF THE CORONER,
County of Pima.

I hereby certify that I received the within summons on the 8th day of November, A. D. 1881, and personally served the same on the 8th day of November, A. D. 1881, on R. H. Paul, being the defendant named in the summons, by delivering it and leaving with said defendant, personally, in the county of Pima, a copy of said summons, together with a true and correct copy of the complaint in this action.

W. B. HORTON,
Coroner of Pima Co., A. T.

[Endorsed:] Filed Nov. 8th, 1881. G. A. Clum, clerk.

6 *Demurrer.*

(Title of Court and Cause.)

Now comes the above-named defendant and demurs to plaintiff's complaint in the above-entitled action, and for cause of demurrer avers that said complaint does not state facts sufficient to constitute a cause of action.

Wherefore defendant prays the judgment of this court as to whether he shall further answer said complaint.

MORGAN, SILENT & STEPHENS,
Attorneys for Defendant.

(Endorsed:) Filed Nov. 25th, 1881. G. A. Clum, clerk.

Minute Order found in Book C, page 247, *under date of October 9th,* 1882.

"Demurrer withdrawn, 20 days given to answer."

Answer.

(Title of Court and Cause.)

Defendant, for answer to plaintiff's complaint herein, denies that on the 28th day of October, 1881, or at any time, at the city of Tucson, county of Pima, or elsewhere, plaintiff was the owner or in the possession of the goods, wares, and merchandise mentioned in the complaint herein.

7 Denies that said goods, wares, and merchandise were of the value of $35,000, but alleges that they were of the value of $———.

Denies that on the 28th day of October, 1881, or at any other time, defendant, at the city of Tucson or elsewhere, took said goods, wares and merchandise from the possession of plaintiff.

Denies that plaintiff, on the date alleged in said complaint or at any time, demanded of defendant the possession of said goods, wares, and merchandise.

Denies that he still wrongfully or unlawfully withholds and detains said goods, wares, and merchandise from the possession of plaintiff.

Wherefore defendant asks to be hence dismissed, with his costs.

MORGAN, SILENT, & STEPHENS,
Attorneys for Defendant.

(Endorsed:) Filed Nov. 15th, 1882. L. S. Williams, clerk.

Amended Answer.

(Title of Court and Cause.)

Now comes the defendant and for answer to the plaintiff's complaint herein—

8 I.

Denies that on the 28th day of October, A. D. 1881, or at any other time, at the city of Tucson, county of Pima, or elsewhere, plaintiff was the owner or in the possession of the goods, wares, and merchandise situated and then and there being in the store-rooms on Congress street, in the city of Tucson, formerly occupied by Lord and Williams Company, described in the complaint herein as "those

certain goods, wares, and merchandise inventoried and scheduled by H. B. Cullum, the plaintiff herein," and denies that said goods, wares, and merchandise are of the value of thirty-five thousand dollars.

II.

Denies that the defendant, on the 28th day of October, 1881, or at any time, at the city of Tucson or elsewhere, without the consent of plaintiff, or wrongfully, or at all, took said goods, wares, and merchandise from the possession of the plaintiff

III.

Denies that before the commencement of this action, to wit, on the 28th day of October, 1881, or at any time, the plaintiff demanded of the defendant possession of the said goods, wares, and merchandise.

9 IV.

Denies that the defendant still wrongfully or unlawfully withholds and detains said goods, wares, and merchandise from the possession of said plaintiff.

For a further separate answer and defense to the above-entitled action defendant alleges that on the 28th day of October, A. D. 1881, and at the several times hereinafter alleged, he was the duly elected, qualified, and acting sheriff of the county of Pima, Arizona Territory. That on said day he received, as sheriff of said county, a writ of attachment, duly issued in the case of G. Howard Thompson *vs.* Lord and Williams, by virtue of which he levied upon and took possession of the goods, wares, and merchandise mentioned in the complaint herein as the property of said defendants, Lord and Williams, in whose possession it was and to whom it belonged, and held the same as said sheriff, and by virtue of said writ, at the time of the commencement of this action.

Wherefore defendant asks to be hence dismissed, with costs.

MORGAN, SILENT & STEPHENS,
Attorneys for Defendant.

(Endorsed:) Amended answer. Filed June 23d, 1883. L. S. Williams, clerk.

10 *Findings of Fact and Conclusions of Law.*

(Title of Court and Cause.)

In the above-entitled cause, after hearing counsel for the respective parties and mature deliberation in the case, the court finds as follows:

I.

That on the 25th day of October, A. D. 1881, at the city of Tucson, Charles H. Lord, W. W. Williams, and C. E. Harlow, then and for

several months before that time composing the mercantile firm of Lord and Williams Company, and exclusively engaged in general commercial business, viz., buying and selling goods, being insolvent, made and executed as such firm a general assignment of all their property not exempt from execution, for the equal benefit of all their creditors, to Henry B. Cullum, the plaintiff, and that the plaintiff immediately accepted said assignment and took possession of the property conveyed by it, including the property mentioned in the complaint, which property was a portion of the property of the said Lord and Williams Company at the time of the assignment. The assignment was executed in the firm name by W. W. Williams, and also signed by said Williams and said Harlow individually,
11 and by said Lord by his attorney, the said C. E. Harlow, the said Harlow then holding a general power of attorney from him, and the said Lord being then absent from the Territory and sick, and his whereabouts being entirely unknown at that time to his partners and family, though every reasonable effort had been made to discover it, and that said assignment was ratified and approved by said Lord at the earliest opportunity.

II.

That on the said 25th day of October, A. D. 1881, and for a long time previous thereto, at said city, the said Charles H. Lord and W. W. Williams were copartners in the banking business and in dealing in live stock, under the firm name of Lord & Williams; that on said last-mentioned day the said firm of Lord & Williams, being then insolvent, made and executed a general assignment of all its property not exempt from execution for the equal benefit of all its creditors to the said Henry B. Cullum, who thereupon immediately entered upon the possession of the same and accepted the trust. Said assignment was executed in the firm name by said Williams, and also signed by him individually, and by said Harlow, as Lord's attorney-in-fact.

III.

12 That said assignments were made in good faith by the said firm respectively, and that at the time of making the same the assignors had full confidence in the ability and integrity of said Henry B. Cullum.

IV.

That on the 28th day of October, A. D. 1881, one G. Howard Thompson commenced a suit in this court against the said Lord & Williams, and sued out an attachment therein against the property of the said Lord & Williams, and placed the same in the hands of the defendant, Robert H. Paul, who was then the sheriff of Pima county aforesaid; and the said Paul, claiming that the goods and property in the complaint mentioned and described were then the property of the said Lord & Williams, and not the property of the plaintiff, seized and attached the same against the will of the plain-

tiff on the 29th day of October, A. D. 1881, and held the same until they were replevied in this suit.

V.

That at the time the said property was so seized and attached it was the property of the plaintiff, and not subject to such seizure or attachment.

VI.

That the value of the property in question is thirty-five thousand dollars.

13 And as conclusions of law from the foregoing facts the court finds—

I.

That the property in the complaint mentioned and described was wrongfully taken and detained by the defendant from the possession of the plaintiff.

II.

That the plaintiff is entitled to a judgment for the return of said property, and if the same cannot be made, for the sum of $35,000 against the defendant.

And it is ordered that judgment be so entered.

Dated Tucson, October 9th, A. D. 1884.

W. F. FITZGERALD,
Associate Justice of the Supreme Court of Arizona, and Presiding Judge of the District Court, First Judicial District, Pima County, A. T.

(Endorsed:) Filed Oct. 11, 1884. C. S. Jeffards, clerk, by J. A. Anderson, Jr., dep.

14 *Judgment.*

(Title of Court and Cause.)

The court having this day signed and filed its findings of fact and conclusions of law in this case, and the value of the property claimed having been found by the court to be the sum of thirty-nine thousand dollars, and the property claimed having been taken into possession of the plaintiff: Therefore—

It is adjudged that the plaintiff have and retain possession of the personal property described in the complaint, together with the costs of this action, amounting to the sum of five hundred and thirty-nine dollars.

Oct. 11th, 1884.

W. F. FITZGERALD,
Associate Justice.

(Endorsed:) Recorded in book 2 of Judgments, page 216.

Statement on Appeal and Amendments and Additions Proposed by Plaintiff and Accepted by Defendant.

(Title of Court and Cause.)

Be it remembered that the above-entitled action came on regularly for trial at the court-house in Tucson, Pima county, Arizona
15 Territory, on the 20th day of May, A. D. 1884, before the district court of said county of Pima, the Honorable W. F. Fitzgerald, associate justice of the supreme court of the Territory of Arizona, presiding, sitting without a jury, a jury having been expressly waived, Messrs. Earll and Campbell appearing as counsel for the plaintiff, and Ben. Morgan appearing as counsel for the defendant, for whom he had answered.

And thereupon the following proceedings were had, to wit:

The plaintiff, to sustain the issues on his part, introduced the following testimony:

H. B. CULLUM, the plaintiff, called, sworn, and examined on the part of the plaintiff, testified as follows:

Mr. CAMPBELL: Q. You are the plaintiff in this suit?

A. Yes, sir.

Q. Did you reside here in October, 1881?

A. Yes, sir.

Q. How long had you resided here at that time, and what was your employment at the date of this assignment?

A. I had been here about a year and a half; I was cashier for Lord and Williams—that is, in the depository of the United States.
16 Q. You were employed by them in the United States depository?

A. Yes, sir.

Q. Were you employed in doing anything else?

A. Attending to the contracts of Lord and Williams and their banking business.

Q. What kind of contracts are you speaking of?

A. Indian contracts, furnishing supplies to Indian agents at San Carlos and the different agencies in the Territory.

Q. At that time had you any connection with the firm of Lord and Williams Company?

A. No, sir.

Q. Will you produce the assignment which you have there?

A. (Produces.)

Q. Also the power of attorney from Charles H. Lord to Charles E. Harlow?

A. (Produces.)

Q. At the time of the execution of this assignment, where was Dr. Lord, if you know?

A. He had started two or three weeks before the failure, may be a longer time than that—it is some time ago and I do not recollect

exactly—for St. Louis, Missouri, to see Hunter, who was associated with him in supplying beef to the Indian agency, at St. Louis, on the Indian contracts.

17 Mr. MORGAN: Q. State where he was, without going into anything about Mr. Hunter?

Mr. CAMPBELL: Q. How long before the execution of this assignment was it that he started?

A. It may have been three or four weeks, or two weeks; it must have been three or four weeks, I think; it was three years ago.

Q. Do you know whether his whereabouts was known at the time of the execution of this assignment to yourself, or to anybody about the house of Lord and Williams Company?

A. No, sir.

Q. Do you know whether any efforts had been made to find him at the time?

A. Yes; he was telegraphed to repeatedly, and to other parties the firm were buying goods of in St. Louis, and the hotels in St. Louis.

Q. I will ask you in regard to the signature of Lord and Williams Company, by C. E. Harlow, on that paper. Do you know Harlow's signature?

A. Yes, sir.

Q. Is that his signature?

A. Yes, sir.

Q. W. W. Williams; is that his signature?

A. Yes, sir.

Q. C. E. Harlow; is that his signature?

A. Yes, sir.

Q. C. H. Lord, by his attorney-in-fact, C. E. Harlow; do you know about that?

18 A. Yes, sir.

Q. That is the signatureof C. E. Harlow, as attorney-in-fact for C. H. Lord, of C. E. Harlow himself, and W. W. Williams?

A. Yes, sir.

Q. When was the whereabouts of Dr. Lord discovered?

A. A day or two after the assignment.

Q. Where was he then; where did he then turn up?

A. It was a few days after the assignment; I do not recollect exactly.

Q. Where did he turn up, then?

A. In a hospital near St. Louis.

Q. When did he return to this place?

A. About the first of December, 1881.

Q. When his wherabouts was ascertained, was any telegrams sent to or received from him?

A. There was one received from W. W. Williams from him that he gave me. (Produces.) It was repeated, as the names were not spelled right; there are three dispatches here, but they are all intended as the same dispatch; the words were not spelled just right and they were repeated.

Q. The telegraph operator repeated them?

A. Yes, sir; at the request of Mr. Williams?
Q. Who is Claude Anderson?
A. He is dead now; he was formerly in the United States depository.
19 Q. Do you know his handwriting?
A. Yes, sir.
Q. Will you look at that paper and see if that is his signature?
A. Yes, sir.
Q. Is that the signature of Charles H. Lord? (Power of attorney.)
A. Yes, sir.

Mr. CAMPBELL: I will offer this power of attorney.

Mr. MORGAN: What is the object of this power of attorney?

Mr. CAMPBELL: Simply to show that Harlow was authorized to act for Dr. Lord in the matter of assignment; that is all.

The COURT: Was it made prior to the assignment?

Mr. CAMPBELL: Yes, sir.

Mr. MORGAN: Our objection is that it is immaterial, irrelevant, and incompetent, and proves no issue of fact; it is simply a general power of attorney.

Mr. CAMPBELL: It is exactly a general power of attorney to do pretty much everything under heaven.

Mr. MORGAN: I will state my objection and have it in the record. My objection is that it is immaterial, irrelevant, and incompetent, from the fact that the power of attorney shows upon its face
20 that it is a personal power of attorney made by Dr. Lord to C. E. Harlow, not involving Dr. Lord as a partner of the firm of Lord and Williams Company.

Mr. CAMPBELL: It is not introduced for that purpose.

Mr. MORGAN: If it is introduced for no such purpose, I fail to see the relevancy of it. We are not dealing with the private individual affairs of Dr. Lord, but with Dr. Lord as a partner of the firm of Lord & Williams Company.

The COURT: Proceed. Let it be read in evidence for the present. I will determine all questions of the admissibility of evidence after the testimony is closed. We will not lose time by discussing the materiality of evidence at this stage of the case. Let the document be considered as read, subject to the objection.

Mr. CAMPBELL: Q. Do you know who composed the firm of Lord & Williams Company?

A. Yes, sir; C. H. Lord, W. W. Williams, and C. E. Harlow.
Q. And when it was organized?

Mr. MORGAN: Q. Is there an agreement in writing as to who constituted that firm?

A. Yes, sir.
Q. Well, I call for the best evidence of that fact.

The COURT: That document must be produced or its loss shown.

21 A. (Witness produces the writing.)

Mr. CAMPBELL: Q. Do you know the signatures of those gentlemen, C. H. Lord, W. W. Williams, and C. E. Harlow?

A. Yes, sir.

Q. When did you first see that paper?

A. A day or two after the assignment.

Q. From whom did you receive it?

A. Mr. Harlow.

Q. You know the signatures of C. H. Lord, W. W. Williams, and C. E. Harlow on this paper to be those of those persons respectively?

A. Yes, sir.

Mr. MORGAN: We object to it as immaterial, irrelevant, and incompetent under the pleadings in this case.

The COURT: Q. What is the document?

Mr. CAMPBELL: Articles of Agreement of Partnership between Lord & Williams Company. I propose to follow that up with proof of the fact that they were there in business together in pursuance of this agreement, dated March 1st, 1881.

Mr. MORGAN: Well, we object to it as tending to prove no issue in this case, no allegation of the complaint, and no matter set forth in the answer. It is entirely immaterial.

The COURT: Let it be read subject to the objection, to be determined hereafter.

22 Mr. CAMPBELL: I will first read the power of attorney, and then this agreement. They are as follows: (Reads.)

Know all men by these presents that I, Charles H. Lord, of the county of Pima, Territory of Arizona, have made, constituted, and appointed, and by these presents do make, constitute, and appoint C. E. Harlow, of the county and Territory aforesaid, my true and lawful attorney for me and in my name, place, and stead, and for my use and benefit to ask, demand, sue for, recover, collect, and receive all such sums of money, debts, dues, accounts, legacies, bequests, interests, dividends, annuities, and demands whatsoever, as are now, or shall hereafter become due, owing, payable, or belonging to me, and have, use, and take all lawful ways and means, in my name or otherwise, for the recovery thereof by attachments, arrests, distress, or otherwise, and to compromise and agree for the same, and acquittances, or other sufficient discharges for the same for me, and in my name to make, seal, and deliver; to bargain, contract, agree for, purchase, receive, and take lands, tenements, hereditaments, and accept the seizin and possession of all lands, and all deeds, and other assurances in the law therefor, and to lease, let, demise, bargain, sell, remise, release, convey, mortgage, and hypothecate lands, tenements, and hereditaments upon such terms and conditions, and under

23 such covenants as he shall think fit. Also to bargain and agree for, buy, sell, mortgage, hypothecate, and in any and every way and manner deal in and with goods, wares, and merchandise, choses in action, and other property in possession, or in action, and to make, do, and transact all and every kind of business of what nature and kind soever, and also for me and in my name, and

as my act and deed to sign, seal, execute, deliver, and acknowledge such deeds, covenants, indentures, agreements, mortgages, hypothecations, bottomries, charter parties, bills of lading, bills, bonds, notes, receipts, evidences of debt, releases, and satisfactions of mortgage judgment, and other debts, and such other instruments in writing of whatever kind and nature as may be necessary or proper in the premises.

Giving and granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises as fully, to all intents and purposes, as I might or could do if personally present, hereby ratifying and confirming all that my said attorney shall lawfully do, or cause to be done, by virtue of these presents.

24 In witness whereof, I have hereunto set my hand and seal the sixth day of April, one thousand eight hundred and eighty-one.

CHARLES H. LORD. [SEAL.]

Signed, sealed, and delivered in the presence of—
CLAUDE ANDERSON.

TERRITORY OF ARIZONA, } ss:
County of Pima, }

On this sixth day of April, A. D. one thousand eight hundred and eighty-one, before me, Williams J. Osborne, a notary public in and for the county of Pima, personally appeared Charles H. Lord, whose name is subscribed to the annexed instrument as a party thereto, known to me to be the person described in and who executed the said annexed instrument as a party thereto, and who duly acknowledged to me that he executed the same freely and voluntarily and for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[SEAL.] WILLIAMS J. OSBORNE,
Notary Public.

Filed and recorded at the request of C. E. Harlow, April 8th, A. D. 1881, at 9.30 a. m., book 2, Powers of Attorney, pages 110, 111, and 112.

CHARLES R. DRAKE,
County Recorder.

25 TUCSON, A. T., *March 1st*, 1881.

This agreement, entered into — and between Lord and Williams and C. E. Harlow, all of Tucson, Arizona Territory, witnesseth: That the said Lord and Williams have this day and date taken into partnership the said C. E. Harlow under the following conditions: They agree that an inventory of their stock of merchandise shall be taken under the supervision of said Harlow, and after its value shall be agreed upon by the parties interested the same

shall be turned over and delivered to the said Harlow as a capital stock, to be sold with his entire direction and supervision under the name and style of Lord and Williams Company for the term of one year from the date of this agreement. The said Harlow shall attend to all the business of the new concern, such as the payment of debts, employment of help, purchase of goods, payment of same, and all expenses attending the proper and legitimate carrying on of the business; shall open a new set of books, in which a complete and true exhibit of the business shall be kept, and always open to the parties interested for inspection; shall, as far as possible, do a cash business; shall remit money to pay debts incurred as fast as the same may be realized from sales; shall not sign, endorse, or
26 negotiate any notes, bonds, or agreements using the new firm name unless strictly in connection with the business of the house, and only then after consultation with one or both the other members of the firm; shall cause, at the end of each month, an exhibit to be made of the condition of the firm in the shape of a balance-sheet; and, finally, every six months shall cause an inventory to be taken of all the property and the books balanced, after which any profit there may be shall be divided as follows: The said Lord and Williams shall have eight-tenths of the same, and the said Harlow two-tenths of the same. In case of loss, the same ratio shall prevail in sharing the same. In this contract it is distinctly understood by the parties interested that the partnership only pertains to that of merchandising, and has no connection in any shape or manner with any business the said Lord and Williams may have jointly or severally outside. Any trade or business they may be able to direct to the new concern they shall do so, any profits to be derived from same to be considered identical with those arising from business with other parties. They, however, shall have at cost price any merchandise they may need or require for their own individual account. In case said Harlow shall add any cash to the capital stock, he shall receive for same ten per cent. interest per year, which amount
27 shall be charged to the general exchange and interest account.

C. H. LORD.
W. W. WILLIAMS.
C. E. HARLOW.

Mr. CAMPBELL:

Q. When did Dr. Charles H. Lord return here?
A. About the first of December.

Mr. CAMPBELL: I will offer these telegrams, dated November first, from Dr. Lord, approving and confirming the assignment.

Mr. MORGAN: I object, on the ground that they have not been proven to be telegrams sent by Dr. Lord, and also on the ground that they are immaterial, irrelevant, and incompetent, because it is an attempted ratification of this transfer of property subsequent to plaintiff's attachment suit.

Mr. CAMPBELL: Well, I will withdraw the telegrams for the present.

Q. When did he return?
A. About the first of December, 1881.
Q. In what condition as to health?
A. He was still feeble.
Q. Were you in the employment of Lord & Williams Company?
A. No, sir.
Q. Were you acquainted with their business at the time of the execution of this assignment?
A. No, sir.
28 Q. Then I will withdraw you from the stand for the present, and call Mr. Sessions.

C. B. SESSIONS, a witness called on the part of the plaintiff, sworn and examined, testified as follows:

Mr. CAMPBELL: Q. What was your business during the month of October, A. D. 1881?
A. I was bookkeeper and cashier of Lord & Williams Company.
Q. How long had you been in their employ?
A. Six or eight months, I think; that is my recollection now.
Q. You had nothing to do with the making of sales, had you, only bookkeeper?
A. That is all.
Q. Will you state if you know anything about their financial condition at the time that this assignment was made?

Mr. MORGAN: We object. The books of the company must show. This gentleman has not been in the employ of Lord & Williams Company for a long time, and has not had access to the books.
The COURT: If you want to show the financial condition of that firm, you must introduce the books.
Mr. CAMPBELL: I do not see how that is necessary.
29 The COURT: That is the ruling of the court; that question is settled for the present.
Mr. CAMPBELL: Note our exception.
The COURT: Counsel can understand that exceptions are taken to all the rulings of the court which are unfavorable to them without the necessity of putting it on record every time.
Mr CAMPBELL: Do you know what amount of cash they had on hand at that time?
Mr. MORGAN: One moment. The books must show that.
Mr. CAMPBELL: I suppose if a party is a bookkeeper and has charge of the cash he may state.
The COURT: The information is derived from books; I think it will be well to wait until the books are brought here.
Mr. CAMPBELL: Well, while we are waiting for the books, I will offer this assignment of Lord & Williams Company. Is there any objection to this assignment?
Mr. MORGAN: Do you offer this assignment separate from the exhibit, just the assignment alone?
Mr. CAMPBELL: Only the assignment.

Mr. MORGAN: I object to it on the ground that it is immaterial, irrelevant, and incompetent, and tends to prove no issue in this case.

The COURT: Let it be read subject to the objection.

Mr. CAMPBELL: It is as follows:

30 This indenture, made the 25th day of October, A. D. 1881, by and between Charles H. Lord, Wheeler W. Williams, and Charles E. Harlow, doing business in the city of Tuscon, county of Pima, and Territory of Arizona, under the firm name and style of Lord & Williams Company, the parties of the first part, and Henry B. Cullum, of the same city, the party of the second part.

Whereas, the parties of the first part are indebted to diverse persons and firms in various sums of money, and have become and are unable to pay such indebtedness in full; and

Whereas, in order to have their assets and effects collected, and faithfully applied in and towards the payment of their said debts, they have concluded to execute these presents.

Now, therefore, this indenture witnesseth: That the parties of the first part in consideration of the premises, and of one dollar to them in hand paid by the party of the second part, at or before the execution and delivery of these presents, the receipt of which is hereby acknowledged, have granted, bargained, sold, assigned, transferred, and set over, and by these presents do grant, bargain, sell, assign, and set over unto the party of the second part, all and singular, the real and personal estate, merchandise, books, debts, accounts, bills receivable, promissory notes, contracts, debts, dues, assets and
31 demands of every nature, kind and description, of the parties of the first part, wheresoever such property, assets, and effects may be or be situated, except such property as is by law exempt from execution.

To have and to hold the above granted and assigned property and effects, and every part thereof, unto said party of the second part, his successors and assigns, in trust, nevertheless, for the uses and purposes following: That is to say, to sell, dispose of, collect, recover and receive the said property, moneys, and effects, and generally to convert the same into money, either at public or private sale, and for the best prices that can be obtained therefor. And with and out of the proceeds of such sales and collections—

1st. To pay and discharge all the just and reasonable expenses, costs, and charges of executing this assignment, and of carrying into effect the trust hereby created, including the lawful compensation of the party of the second part for his services in executing said trust.

2d. To pay and discharge out of the residue of said money from said sales and collections all the debts and liabilities now due, or to become due from the said parties of the first part, a schedule of which the parties of the first part will furnish the party of the second part as soon after the execution and delivery of these
32 presents as the same can be made out; and if the residue of said money arising from said sales and collections shall not be sufficient to pay the said debts and liabilities in full, and the in-

terest moneys due thereon, then to apply the same, so far as they will extend, to the payment of the said debts and liabilities and interest moneys proportionately to their respective amounts, and if after payment of all the costs, charging and expenses attending the execution of said trust, and the payment and discharge in full of all the lawful debts owing by the said parties of the first part, of any and every description, there shall be any surplus of the said proceeds remaining in the hand of the party of the second part, then to pay such surplus to the parties of the first part, their executors, administrators, and assigns: Provided, however, that if, after the payment of the partnership debts, there be any moneys remaining, said moneys shall be applied to the payment of the individual debts and liabilities of the parties of the first part, the share or portion of such surplus belonging to each of the respective parties to be applied to the payment of the debts of such party (and not to the debts of the other) and without preference to the individual creditors; and then if there remains any surplus the same shall be distributed as above provided among said parties of the first part, in proportion to
33 their respective interest in the said partnership property; and the parties of the first part hereby constitute and appoint the party of the second part their attorney in fact, irrevocable, to ask, demand, sue for, recover and receive the above assigned property and effects, and every part thereof.

In witness whereof the parties of the first part have hereunto set their firm name and, not having any firm seal, affixed the seal of the partner signing said firm name, the day and year in this assignment first above written.

LORD & WILLIAMS CO.,
(C. E. HARLOW).
W. W. WILLIAMS.
C. E. HARLOW.
C. H. LORD,
(By his attorney-in-fact, C. E. HARLOW).

Signed, sealed, and delivered in the presence of—
H. FARLEY.

I hereby accept the trust created by the foregoing assignment, and agree faithfully to perform the same.

HENRY B. CULLUM.

Tucson, Pima county, Oct. 25th, A. D. 1881.

Witness:
H. FARLEY.

TERRITORY OF ARIZONA, } ss:
County of Pima, }

On this 25th day of October, A. D. 1881, before me, Hugh Farley, a notary public in and for the county of Pima, Territory of
34 Arizona, personally came Charles E. Harlow, the attorney-in-fact of Charles H. Lord, and known to me to be said attorney, and who, as such attorney, executed the foregoing instru-

ment, and acknowledged that he executed the same as the act and deed of said Charles H. Lord therein described, and for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

HUGH FARLEY, [SEAL.]
Notary Public.

TERRITORY OF ARIZONA, }
County of Pima, } ss:

On this 25th day of October, A. D. 1881, before me, Hugh Farley, a notary public in and for the same county of Pima, personally appeared Wheeler W. Williams and Charles E. Harlow, the persons whose names are subscribed to the foregoing instrument as parties thereto, personally known to me to be the persons who executed the said instrument, and they, each for himself and not one for the other, acknowledged to me that they executed the same freely and voluntarily, and for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year in this certificate first above mentioned.

HUGH FARLEY, [SEAL.]
Notary Public.

35 Filed and recorded at request of H. B. Cullum, Oct. 25th, A. D. 1881, at 5.15 p. m., Book 10, Deeds of R. E., pages 666, 667, and 668.

CHARLES R. DRAKE,
County Recorder,
By ANTHONY COENAN, *Dep.*

H. B. CULLUM, recalled for the plaintiff, testified as follows:

Mr. CAMPBELL: Q. Is this your handwriting here, Mr. Cullum, to this acceptance?

A. Yes, sir.

Q. State whether, immediately on the acceptance of this assignment, on the 25th of October, 1881, you entered into the possession of the store mentioned in the complaint.

Mr. MORGAN: We object, as being immaterial, irrelevant, and incompetent.

The COURT: The objection is overruled.

Mr. MORGAN: Note our exception.

A. I immediately took possession; took the signs down, closed the door, and proceeded to take an inventory, and Mr. Williams and Mr. Harlow went around with me to the employees, and told them that they had made an assignment.

Mr. MORGAN: Q. State only what you did.

Mr. CAMPBELL: Q. That assignment was delivered to you on that day, and you then did what?

36 A. I either took it or sent it by some person to the recorder's office and had it recorded.

Q. On that same day?

A. Yes, sir.

Q. What time of the day was it?

A. About five o'clock.

The COURT: Will not the instrument show for itself?

Mr. CAMPBELL: Yes; it shows that it was recorded at five o'clock.

Q. You then went into possession; what did you do in the way of taking possession on that day?

A. After I closed the doors, I took the signs down, and commenced taking an inventory.

Q. Did you have a complete inventory made at that time?

A. I followed it up until it was completed.

Q. Well, now, state whether at any time during that time you did anything else up to the time the sheriff came there for the defendant; did you do anything else besides taking an inventory; what else did you do in your character as assignee, if anything, towards keeping and maintaining possession of the property? in the store?

A. At night I had a man sleeping there and during the day we were taking the inventory continually.

37 You said something about informing the employees; what was done there in relation to that?

A. Mr. Williams and Mr. Harlow went with me and informed the employees that I was the assignee and in charge, and they were responsible to me for their acts, and under my direction.

Q. What did you do, if anything, in relation to the employment of any of them?

A. I made arrangement for their continuance, those that I needed during the time I was taking the inventory.

Q. For those you needed; what did you do in regard to any others?

A. I think there were one or two extra clerks employed to assist in taking the inventory.

Q. You proceeded with the inventory up to what time; when were you interrupted; and, when did Mr. Paul as sheriff make his appearance?

A. I think it was on the 28th or 29th of October.

The COURT: Q. What was the date you took possession?

A. The 25th.

Mr. CAMPBELL: Q. You remained there continuously in possession until the sheriff came there on the 28th or 29th?

A. Yes, sir.

Q. What did the sheriff do then?

38 A. He demanded possession; I refused. He said he was directed by the plaintiff here, Mr. Thompson, to take full charge.

Q. Did he proceed to go on and act there, and take an inventory, and so forth?

A. Yes, sir.

Q. Then you commenced this action?

A. Yes, sir.

Q. While he still claimed to be there?

A. Yes, sir; he said he was directed to take all the books, papers, and put seals on the safes and on the drawers.

The COURT: What was the date of the assignment?

A. 25th October, 1881.

Q. And on the 28th the sheriff came there?

A. Yes, sir.

Mr. CAMPBELL: The goods under our arrangement are admitted to be worth thirty-five thousand dollars.

Mr. MORGAN: Yes, sir; that is agreed to.

Mr. CAMPBELL: Q. About what time was the inventory of the stock completed?

A. In the early part of November; I think, the 5th or 8th—somewhere along there.

Q. When you completed that inventory, will you state what you did with it?

A. After the goods were replevied from the sheriff I sold them to H. B. Claflin & Co.

39 Q. What did you do with the inventory that was taken?

A. I put the amount in my schedules.

Q. I want to get at whether this is the inventory you took?

A. Yes, sir; this is the inventory of the goods—that is, the total amount of the inventory in there; but the inventory that I had taken in a compiled form is in my office. This contains the total amount of the inventory, and is everthing that there was there. That is, the inventory I proceeded to take was the merchandise, and then the accounts were listed by the bookkeeper, and I checked them off of the books.

Q. And then you annexed the whole to the assignment?

A. Yes, sir.

Q. So this document gives us a complete showing of the affairs as they appeared at the time?

A. Yes, sir; so far as learned.

Q. Now, according to the inventory so taken, including everything that there was there, how did you estimate the values? In taking the inventories did you estimate the values?

A. As to the merchandise, yes, sir.

Q. How with regard to the book accounts and bills receivable?

A. The balances were placed as listed there.

40 Q. Did you make any deduction for bad debts, or anything of that kind?

A. No, sir.

Q. Now, with regard to the stock, when you came to examine that, on what basis do you say your inventory was made?

A. The merchandise was inventoried on the basis of purchase, with freight added.

Mr. MORGAN: That is immaterial. It is agreed that the value of the goods attached was thirty-five thousand dollar. Now, what is the use of going into this?

Mr. CAMPBELL: I am simply showing that they were utterly insolvent at the time of the making of this assignment. That is the object of this testimony; that is all.

Mr. MORGAN: If it is for the purpose Judge Campbell states, then we object to it on the ground that it is immaterial, irrelevant, and incompetent, and not an issue in this case under any phase of it?

Mr. CAMPBELL: I do not know that it is necessary, but I thought I would make this thing as plain as anything could be.

The COURT: I can see myself it might become important.

Mr. CAMPBELL: Q. There is a summary I see attached to that inventory of the assets and liabilities. I will ask you in regard
41 to the merchandise. You say you valued it on the basis of actual cost in the place where it was purchased, with the addition of the freight to this place. Now, what character of merchandise was that as to its real value as compared with that estimated value?

Mr. MORGAN: We make the same objection to that.

Mr. CAMPBELL: Whether the stock was a new stock or an old stock, or how it was.

A. In many cases the value was entirely too high.

Mr. MORGAN: We shall object to this sort of thing. I do not want this assignee to come in and, under a statement of his own, make this firm insolvent. I want him to prove it by a proper basis of proof. Of course he is an interested party here when he undertakes to say that Lord and Williams overestimated the property, and when he becomes assignee he underestimates it to make them insolvent. I object to that character of testimony on the part of this witness.

Mr. CAMPBELL: What I propose to show is that in making out the inventory the goods were estimated upon a certain basis as to their value. I propose to show that that was not a correct mode of valuation, because they were in fact an old stock, much of it having been there for years and years, and utterly unsuited for the
42 market, and comparatively good for nothing; that its real value at that time, and all the goods could be sold for, was what they were sold for, and that is what I propose to show by this witness. For instance, I presently propose to introduce the inventories showing just what there was there, and what it was sold for, and what it was valued at under that kind of a valuation.

The COURT: That is the inventory which you hold in your hand?

Mr. CAMPBELL: Yes, sir; the inventory of the goods is eighty-two thousand dollars. I propose to show that it was not worth anything like that; that it was not worth half that.

The COURT: This inventory was taken by the assignee?

Mr. CAMPBELL: Yes, sir.

Mr. MORGAN: And now he wants to impeach it.

Mr. CAMPBELL: I do not at all; I want simply to show how the thing is charged in the inventory and what its value was.

Mr. MORGAN: It is admitted, for the purpose of this suit, that the value was thirty-five thousand dollars.

Mr. CAMPBELL: I propose to show that this inventory does not show the real valuation.

The COURT: It seems to me, if you are going to make any inquiry as to the inventory, you had better have the detailed inventory here.

43 Mr. CAMPBELL: This is an abstract simply of what the inventory shows. All I want to show is, although it is not necessary to do it, that the goods here were sold subsequently, and were estimated by merchants, and that there was a valuation placed on them; that merchants here were called in and put a valuation on this property.

The COURT: Who called these merchants in?

Mr. CAMPBELL: Mr. Cullum. All the leading merchants of the town were called in.

The COURT: Let the testimony be admitted, subject to the objection.

Mr. CAMPBELL: Q. You say that you had an inventory made; has that always been open to the inspection of all the creditors, and has it been inspected by this defendant and his attorney?

A. Yes, sir.

Mr. MORGAN: Q. Let me ask you if you have filed this document, this inventory, in the recorder's office?

A. No, sir.

Q. You have always kept it under your control and in your possession?

A. Yes, sir.

Q. You never made it a part of the record of the assignment?

A. No, sir.

The COURT: Was it open to the inspection of creditors?

44 A. Yes, sir; and inspected by a great many of them at a creditors' meeting.

The COURT: It was exhibited at a meeting of creditors?

A. Yes, sir.

Q. And whenever called for, it was shown to any one who had the right to examine it?

A. Yes, sir.

Q. Any creditor or any attorney of any creditor?

A. Yes, sir.

Mr. CAMPBELL: Q. And was in fact exhibited to the defendant in this case, and to Judge Silent, who was one of his attorneys at that time?

A. Yes, sir.

C. B. SESSIONS, recalled for the plaintiff, testified as follows:

Mr. CAMPBELL: Q. I will ask you one or two more questions. You say you were the bookkeeper of Lord & Williams Company; will

you see what balance of cash you had on hand at the time of this assignment, the 25th of October, A. D. 1881?

A. $50.26.

Mr. MORGAN: Q. The book shows that?

A. Yes, sir.

45 Mr. CAMPBELL: Q. Will you state whether or not any of the creditors at that time were pressing any claims against the concern?

Mr. MORGAN: We object as immateriel and irrelevant.

The COURT: The objection is overruled.

Mr. MORGAN: Note our exception.

A. I do not know.

Mr. CAMPBELL: Q. Do you know anything about the Giant Powder Company at that time making any applications?

A. Yes, sir; I do recollect now, I had forgotten that instance.

Mr. MORGAN: Q. What figure does that cut here? I understand the assignee has paid that claim. I object to it as immaterial and irrelevant. What one particular creditor was doing at this particular time does not prove the fact of insolvency.

The COURT: It is a circumstance; let it go in the same as the other testimony.

A. My recollection is that Bandmann, Neilson & Co., the general agents for the Giant Powder Company in San Francisco, wrote a short time before the failure and asked Lord & Williams Company to send them a check for ten thousand dollars.

Mr. MORGAN: I demand the letter.

The COURT: It seems to me that these letters, if they are in
46 existence and can be had, would be the best evidence of that fact. You are depending entirely upon the recollection of the witness in relation to a matter that was written and occurred several years ago.

Mr. CAMPBELL: It is simply for the purpose of showing that there were persons pressing their demands, and that large demands were being pressed upon the concern which they had not the money to meet, that is all.

The COURT: this is a circumstance which is proper to be taken into consideration with the other circumstances. In passing upon this matter, of course I shall eliminate from it everything that is irrelevant.

Mr. CAMPBELL: Will you see from your book whether there was any thing due to the Giant Powder Company at that time?

Mr. MORGAN: We object to that: it is entirely outside of any issue here.

The COURT: I understand the question is asked for the purpose of showing that there was not only an indebtedness due this company but that this company was pressing the collection of this debt?

Mr. CAMPBELL: Yes, sir; that is it. It is a circumstance which

may or may not have something to do with the making of the assignment.

47 A. The book shows that there was due the Giant Powder Company at that time the sum of $25,138.30.

The COURT: What is the date?

A. The last entry is October 25th.

Mr. CAMPBELL: Q. What is the next entry previous to that?

A. October 3d.

Q. Now I will ask you, do you know anything about any application on their part about that time for a settlement of their account?

Mr. MORGAN: We object.

The COURT: If he knows, he can state it, but it might be questionable as to how he derived his information. If this letter making this demand is in existence, it ought to be in the possession of the assignee as correspondence of this firm.

Mr. CAMPBELL: Q. Do you know what became of that letter? Who had general charge of such letters?

A. Well, I suppose—I do not know, but I suppose it was turned over to the assignee with all the other things.

Q. When Mr. Cullum came in as assignee, were all such papers turned over to him?

A. Yes, sir.

The COURT: Well, there must be some search made as to whether it can be found before secondary evidence will be admitted.

48 Mr. CAMPBELL: Now I will ascertain from Mr. Cullum what he knows about that paper.

H. B. CULLUM recalled for the defendant, testified as follows:

Mr. CAMPBELL: Q. You as assignee received the papers of Lord and Williams Company?

A. Yes, sir.

Q. Did you receive any papers from Mr. Sessions?

A. Yes, sir; books, letters, and papers connected with the business.

Q. What became of those letters, books, and papers?

A. Those that did not concern the collection of claims particularly, about June, 1882, I removed them up to the warehouse formerly occupied by Lord and Williams, who were the owners of the property, for storage. While I was East attending the litigation in connection with this estate——

Mr. MORGAN: I object; we will try this case, and not the litigation in the East.

A. My book-keeper wrote to me——

Mr. MORGAN: I object; that is irrelevant; where is the letter?

A. That Mr. Thomas Fitch——

The COURT: It appears that a paper or letter was in exist-

49 ence. It is now proper before secondary evidence will be ad-

mitted to show that diligent search has been made where the paper is likely to be found, and that it cannot be found.

Mr. CAMPBELL: I propose to show that while the assignee was East, these papers were moved from the warehouse where they were placed by him, and were destroyed.

A. All the letters of Lord and Williams Company were stored at the warehouse, and during my absence they were removed to the Opera House by Mr. Fitch, and the locks changed on the warehouse.

The COURT: Removed by Mr. Fitch?

A. Yes, sir; one of the attorneys on the other side, at least one who was acting as an attorney. The Opera House burned up and the papers were destroyed; I presume this letter was among those papers, because I have been unable to find it since.

The COURT: What was Mr. Fitch doing with these papers?

A. He attached the warehouse and claimed to have title by sheriff's deed and he removed about two tons of this stuff to the Opera House.

Q. All the correspondence of Lord and Williams Company, you say, was in that warehouse?

A. Yes, sir.

Q. When did you make this search?

A. At noon.

50 Q. Did you find any correspondence of Lord and Williams Company?

A. No, sir.

Q. No letters at all?

A. No, sir.

Q. And if there is any such letter in existence you do not know where to search for it?

A. No, sir.

Q. You have made an honest, *bona fide* search for that paper?

A. Yes, sir.

Q. The existence of the paper having been testified to by Mr. Sessions, and after a search of that sort having been made, I think it proper that secondary evidence should be admitted.

Mr. MORGAN: Q. Let me ask Mr. Cullum one or two questions. How did you know at noon testimony regarding this letter was to be given?

A. Mr. Sessions has told me of this letter, and of the demand made by Bandmann, Neilsen & Co., or the agent of the Powder Company on Lord and Williams Company.

Q. When did Mr. Sessions tell you that?

A. This morning.

Q. Did Mr. Sessions know that that letter was going to be called for?

A. No, sir.

51 Q. How did it come that Mr. Sessions told you that he had received that letter from Bandmann, Neilsen & Co. this morning?

A. In conversation about Lord and Williams Company's affairs.

Q. Did he suggest to you that that question would be presented to this Court, that creditors were pressing Lord and Williams Company?

A. No, sir; this question of insolvency was presented, and he told me of that circumstance this morning.

Q. Mr. Sessions suggested to you this morning that he remembered it although he did not remember it just now on the stand when he was asked about it, until his attention was called to it—he told you this morning he remembered a letter that the firm had received from Bandmann & Co., pressing their claim, did he?

A. Yes, sir.

Q. Without any suggestion from you at all?

A. Yes, sir.

Q. It came from Mr. Sessions?

A. Yes, sir.

The COURT: Q. What time did you say Mr. Sessions told you this?

A. This morning about ten o'clock.

Q. That there was a demand made by the Giant Powder Company by letter for their money?

A. Yes, sir.

52 Q. Was that the only demand he spoke to you of at that time, that he remembered of having been made?

A. Yes, sir.

Mr. CAMPBELL: Q. Were you requested to see Mr. Sessions and ask him about their affairs generally, about that time, what he knew of them?

A. No, sir.

Q. As to their solvency or insolvency?

A. No, sir.

C. B. SESSIONS, recalled for the plaintiff, testified as follows:

Mr. CAMPBELL: Now, Mr. Sessions, will you state what is the substance of that communication?

A. Well, it has been so long that I have not a very distinct recollection of the letter. My recollection is, however, that it was a letter in the nature of a dun, and this amount stated which they would like to have a check for. Ten thousand dollars, I think, was stated in the letter; I think it was also stated the balance that was due the company.

Q. Do you recollect what that was?

A. No, sir.

Q. Can you state generally what the condition of Lord & Williams Company's affairs was at that time as to being prosperous or otherwise.

53 Mr. MORGAN: We object to that; it is the same question passed upon this morning by the court. The opinion of this witness is asked for.

The COURT: Repeat the question.

Mr. CAMPBELL: Q. Do you know anything about the condition of affairs of Lord & Williams Company, as to their being prosperous or otherwise at the time of the assignment, and if so, what do you know about it?

The COURT: If he knows, of course he may testify to it.

Mr. CAMPBELL: He was there and kept their books and knew what went in and came out every day.

The COURT: If he knows this of his own knowledge, let him state it; if he does not, he cannot state it.

Mr. CAMPBELL: What do you know about the condition of affairs of Lord & Williams Company?

A. Well, I know that they were not doing a prosperous business.

Q. How do you know it, in what respect?

A. Well, I could tell from the daily sales which I had to foot up every night.

Q. How was it about the daily sales? How did that indicate the house was not prosperous, in what respect?

A. The system that Mr. Williams adopted was this: they
54 would put down the cost mark of each article and put down what it was sold for as it was sold, the cost and selling price in separate columns, and they were both footed up, and the difference between the two would show the gross profits of the day; those had been very small for months and did not show a very prosperous state of affairs.

Q. Do you know how it was as to debts—whether they were making good or bad debts, or anything of that kind?

Mr. MORGAN: I object.

The COURT: I think that is rather doubtful.

Mr. CAMPBELL: Q. Do you know whether or not they were making any profit at all at the time of the suspension?

Mr. MORGAN: I object; it is the opinion of the witness without any authority for it.

Mr. CAMPBELL: How are going to show the condition of a man, if you cannot show it by his book-keeper?

The COURT: If the witness knows, he may state; but if he is asked his opinion, why, of course, that would not be proper.

Q. (Question read.)

A. Well, I think I can say they were not.

The COURT: That they were making no profit at all?

A. That they were making no profit at all. There is, how-
55 ever, a little book that would show that; I do not know where it is; I do not see it here. It will show to a cent whether there was a profit or not.

Q. Who had charge of that book?

A. It is a little sales book.

Mr. MORGAN: I move to strike out his testimony on that ground.
Mr. CAMPBELL: To whom was it delivered?

A. To the assignee, Mr. Cullum.
Q. Mr. Cullum, have you ever looked for it?

Mr. CULLUM: No, sir.

Q. Mr. Sessions, do you know anything about their incurring bad debts, and to what extent?

Mr. MORGAN: Q. Of your own knowledge?

A. Yes, sir; I know of some bad debts that were incurred.
Q. Have you sufficient general knowledge of their business to know whether they had incurred bad debts to any considerable extent or not? How long had you been in their employ?
A. As I stated this morning, about six months, I think; somewhere in the neighborhood of six months.
Q. You were almost an entire stranger in the community, were you not?
A. At that time; yes, sir.
Q. And you were simply the book-keeper or cashier of that house?
A. Yes, sir.
56 Q. You had nothing to do with the sales or customers?
A. Nothing at all.
Q. Can you explain how it is that this morning you explained to Mr. Cullum the fact of your referring to this letter?
A. Yes, sir; I can.
Q. Explain that, will you, about what suggested you to tell that to Mr. Cullum this morning?
A. Well, about ten o'clock this morning Mr. Cullum came to my office and asked me if I would come up here and testify in the case. I said yes, and he mentioned various matters connected with the firm for the purpose, I presume, of refreshing my memory in regard to them—figures of the liabilities, assets, and so forth, and the general state of their affairs, their solvency or insolvency, and he asked me the question whether I considered them insolvent or not, and what would lead me to that opinion, or to any opinion that I had. Of course, among other things, I believe I stated that they had been called on for a large amount of money, which they could not remit, and mentioned this letter.
Q. Fifty dollars appears on your books there; is that all Lord and Williams Company were worth on that day?
A. That is the cash balance.
57 Q. Do you know where they kept their bank account?
A. What bank account?
Q. Of Lord and Williams Company.
A. With Lord and Williams.
Q. Do you know what amount they had to their credit in the bank of Lord and Williams at that date?
A. I do not think they had anything.

Q. How do you know; did you have charge of that?
A. I had charge of the bank book.
Q. You had charge of the books?
A. Yes, sir.
Q. On that day the balance of that day's work was fifty dollars on hand, after paying expenditures?
A. Yes; fifty dollars and some cents.
Q. After deducting the expenses of the day from the receipts?
A. Yes, sir.
Q. They banked with Lord and Williams?
A. Yes, sir.
Q. And you kept their bank account?
A. Yes, sir.
Q. Were you the book-keeper of the bank, too?
A. No. Only the book-keeper of Lord & Williams Company. Whenever I had money to deposit I took it into the bank.

58 Mr. CAMPBELL: Q. Had Lord & Williams a separate book-keeper?

A. Yes, sir.
Q. You were the bookkeeper for Lord & Williams Company?
A. Yes, sir.
Q. And who kept the books for Lord & Williams?
A. Well, Mr. Wilson kept the books for one department of Lord & Williams' business, what were generally called the old books. I do not know what the accounts consisted of; and, as I have stated already, Cullum kept the books of the bank, or at least Mr. Cullum had charge of that department.

Mr. MORGAN: Q. What business, if you know, was Lord & Williams engaged in at that time?
A. Lord & Williams were engaged in banking and government contracts.
Q. What assets, if you know, did they have?

Mr. CAMPBELL: We object to any enquiry about the assets of Lord & Williams.

The COURT: I would like to ask a question. Were these different businesses conducted in different stores or places, or were they all in the same building?

A. They were all in the same building, the same block; they were separated by partitions and doors, that is about all.

59 Q. Were there doors leading from the interior of this establishment connected each other?

A. Yes; there was a door leading out of Lord & Williams' Company into Lord & Williams' private office, and then a door from Lord & Williams' into the bank, that was the connection.
Q. The customers passed from one building to the other without going into the street?
A. They could have done so, but it was not customary.

Mr. CAMBELL: Q. They would have had to pass through Mr. Williams' private office?

A. Yes, sir.

Q. Who was the active man in managing the Lord & Williams Company business while you were there?

A. C. E. Harlow.

Q. He had charge and directed?

A. Yes, sir.

Q. Well, now what was their habit in regard to making deposits and drawing checks at that time?

A. Whenever I had more money than I cared to keep in my safe, I used to take it into the bank of Lord & Williams, make a deposit there and placed it on the bank book which we kept with them, and whenever I wanted exchange on New York or San Francisco, I drew for it. I drew on them for it and they gave me a check.

60 Q. When you wanted to draw a check on whom did you draw it; if it was on behalf of Lord & Williams Company did you draw checks in the name of Lord & Williams Company?

A. The checks were always signed by Mr. Harlow, the checks of Lord & Williams Company were signed by Mr. Harlow and drawn upon Lord & Williams.

Q. Do you know whether or not the bank account was overdrawn at the time of this assignment?

Mr. MORGAN: We object to that as immaterial.

The COURT: Yes, unless he knows it of his own knowledge. Do you know?

A. Yes, sir.

Q. If you do, then you can state it.

A. It was overdrawn.

Mr. MORGAN: Q. They were overdrawn against their account with Lord & Williams?

A. Yes, sir.

Mr. CAMPBELL: Q. In regard to the signs that were up there during the existence of Lord & Williams Company, were there any signs up there?

A. One, I believe, my recollection is that there was.

Q. What was on it.

A. Lord & Williams Company.

Q. Do you know whether Lord & Williams had any sign in front of their place?

61 A. I recollect that Lord and Williams had a sign on an old awning which was in front of the door, I do not know whether it was in front of Lord & Williams' bank or not. I am satisfied it was not; it was an old awning that had been left there from the time Lord & Williams did business.

Q. There was a sign of Lord & Williams Company, where was that put?

A. That was on the door facing Main street.

Q. The door leading into the store?

A. Yes, sir.

Q. Do you know whether they had any advertisement in the paper?

A. Yes, sir.

Q. Will you see whether you recognize that advertisement; are you familiar with the daily Citizen, a paper published at that time?

A. Yes, sir.

Q. Look at that copy of it and see whether that is the advertisement?

A. Yes, sir.

Mr. CAMPBELL: I will offer the advertisement. It is an unique specimen of advertising.

Mr. MORGAN: Q. Is that the purpose for which you offer it?

Mr. CAMPBELL: No, sir; not exactly.

Mr. MORGAN: I have no objection to it if you get along.

62 Mr. CAMPBELL: Now, in regard to the bills that were made out for purchases made at the store, in whose name were they made out, and in whose name were the receipts given?

A. Lord and Williams Company.

Q. The purchases made by the store; there were a great many goods brought in there while you were there?

A. Yes, sir.

Q. And charged to Lord and Williams Company.

A. Yes, sir.

Mr. MORGAN: Q. You say that this store of Lord and Williams Company was separate from the store of, or the business of, Lord and Williams?

A. Yes, sir.

The Washington Tragedy.

All idle gossip—Lord and Williams failed to meet the ardent desires of certain struggling aspirants to the high position they long have occupied as the leading commercial house of the Territory, but on the contrary they are stronger than ever—failure not being found in their lexicon—and they announce the inauguration of a grand change in their mercantile department, as it had grown to such proportions that they were obliged to call in help, and have

63 this day admitted to a partnership, in the mercantile branch alone, C. E. Harlow, whose large experience throughout Arizona renders him eminently fitted to manage that branch of the new concern, which, under the name of Lord and Williams Company, will continue to float their flag over the old concern which has been a land mark of the city for years, and the starting point to success for everyone who has left its doors. We will furnish everything needed in the country in the shape of first-class, fresh merchandise to close, sharp cash or short-time buyers at such prices that there will be no occasion to lose time in shopping around. We are right up on deck with the flood tide and bound to please everybody and give them a corner room on the first floor. We shall give all the accommodations and advantages to the retail trade that can

prudently, honestly, and reasanably be done. Sixteen years has given us an experience in the country which should satisfy all reasonable buyers that we are headquarters for everything in our line. We are exclusive agents for the Giant Powder Company for Arizona, and are prepared to furnish giant powder in any quantity desired. We also have the exclusive agency for this Territory for C. C. Conrad & Co.'s Budweiser beer which is shipped to us direct from the brewery at St. Louis in car-load lots. Miners' and
64 mining supplies a specialty. All parties indebted to the old firm of Lord and Williams are respectfully invited to call and settle, and they earnestly invite all their old patrons to an acquaintance in the Lord and Williams Company.

H. B. CULLUM, recalled for cross-examination, testified as follows:

Mr. MORGAN: Q. In your examination in this statement which you prepared, I find the following: "Mr. Williams and Mr. Harlow informed me about five o'clock p. m. to the effect that the Bank of California had sent their claim to attorneys here, who had called on them with others, and had threatened attachment suits, and they, under advice of counsel, concluded to make assignments and requested me to accept the trust. In looking around they thought I was the most desirable and available person, owing to my experience in winding up several large estates, and my being familiar with the complications of the Indian contracts and having some knowledge of their business." Is that true?

A. Yes, sir.

Q. That is the reason this assignment was made?

A. These claims were pressed.

Q. That reason you give is the true reason why the assignment was made?

65 A. I presume that is so. Mr. Williams is present in court; you can a-k him; he has knowledge of his own business.

Q. You sold some merchandise to H. B. Claflin & Co.?

A. Yes, sir.

Q. What merchandise was that?

A. It was the goods of Lord and Williams Company, except the Studebaker wagons and the Giant Powder that was inventoried after the assignment.

Q. Well, will you inform the court how you determined the question that that was the merchandise of Lord and Williams Company?

A. By being in their store and listed on their books as their merchandise, and under their control and direction.

Q. That is the only way you know that the title to those goods was in Lord & Williams Company?

A. I know Mr. Harlow had control of the business and that he said that was their stock.

Q. Mr. Harlow said that was their stock; that is the only information you have got on the subject?

A. And I was perfectly familiar that that was the case.

66 Q. I thought you said yesterday afternoon you had nothing to do with Lord & Williams Company, and were not familar with their business?

A. If I know Mansfield has a store down here, I know or suppose that it belongs to him.

Q. Do you know that Mansfield owns the property in the store down there?

Mr. CAMPBELL: I think there should be a limit to the cross-examination somewhere.

The COURT: I think the examination is proper.

A. I think I had a legal right to think they were Lord & Williams'; they were listed to me as Lord & Williams Company—that is, they directed me that that was their property when I was made assignee.

Mr. MORGAN: Q. That is all you know about it?

A. I knew they were buying and selling all the time, and kept books.

Q. You have not paid a creditor of this estate a dollar, have you?

A. Yes, sir; as I stated yesterday.

Q. Except by this compromising, marking one off with another?

Mr. CAMPBELL: If you will let the witness give an answer before you start with another question—

Mr. MORGAN: Well, you always know when to come to his relief.

67 The COURT: I will ask counsel if he expects to connect the acts and doings of the assignee with Lord & Williams Company?

Mr. MORGAN: Yes, sir; I expect to show that Lord & Williams Company is simply the alias of Lord & Williams.

The COURT: (After argument.) If by this examination it can be shown that there was a conspiracy between this party and the assignors previous to the assignment, and subsequent acts of his which will connect them, or be connected in any way with those acts, I think it is proper to come out. At any rate, proceed with the examination, and if it is improper, at the proper time we will eliminate it from the testimony.

A. There were liabilities at the date of suspension that were paid by Lord and Williams Company and Lord and Williams estate.

Q. What?

A. I say I have paid some claims of Lord and Williams and Lord Williams Company.

Q. Have you paid them in full?

A. For instance, that Giant Powder Company, while they appeared as a creditor, they were not.

Q. Mr. Williams was a large contributor in goods and capital to the firm of Lord and Williams Company, was he not?

A. Yes, sir; he was one of the old firm of Lord and Williams.

Q. Can you answer my question, if you know?

68 A. Yes, sir.

Q. He contributed to the capital of Lord and Williams Company?

A. Yes, sir.

Q. What did Harlow contribute to that?

A. Not anything under the contract.
Q. Harlow had nothing, had he?
A. Nothing that I know of.

Mr. CAMPBELL: Q. Speak from your own knowledge distinct from that derived from that of the contract.

A. He had nothing that I know of.
Q. Now you spoke about the Giant Powder and the Studebaker wagons being entered on the list of assets of Lord and Williams Company and afterwards being withdrawn from them; now state how that withdrawal took place; give us all you know about the Giant Powder matter first.
A. In the list there was some four thousand dollars of powder as being on hand and among the accounts; there had been some fourteen thousand dollars of powder sold.
Q. You mean on uncollected amounts?
A. Yes, sir; that were listed as assets. The powder being mixed in with the sales of merchandise and other articles. A short time after the assignment Mr. Cowdery, the attorney of the Giant Powder Company, came to Tucson and claimed the powder and these
69 accounts, or the most of these accounts wherein powder was sold, on the ground that the contract with the firm was a consignment contract, that they were merely acting as agents. That was my understanding from the firm of Lord and Williams Company, and after investigating the matter with my attorneys, it being their opinion that it was a consignment contract, and that Lord and Williams were only the agents, I delivered the powder, which amounted to about four thousand dollars, and the moneys that I had collected on this powder in these different accounts. I turned these over and collected other accounts at different times and turned those over also. They gave me a bond of twenty-five thousand dollars indemnity in case it was proven that it was Lord and Williams' property. The total amount of receipts and payment to them amounted to between fourteen and fifteen thousand dollars.
Q. Did you go over the agreement under which that powder had been delivered with your counsel and Mr. Cowdery?
A. Yes, sir.
Q. And on the advice of your counsel you delivered over that powder as the property of the Giant Powder Company?
A. Yes, sir.
Q. And delivered over what you received?
70 A. Collections I made subsequent to the assignment. There was no money on hand at the time of the assignment.

Mr. CAMPBELL: We close our testimony.

Mr. MORGAN: In order that counsel may not be taken by surprise, I notify him that I will make a motion to strike out the entire testimony given in this case, on the ground of variance between the allegations of the complaint and the testimony. I will then move for a nonsuit on the statutory grounds that the plaintiff has not made

out his cause of action as alleged in the complaint. I give notice that after recess I will present those two motions.

The COURT (after the motions had been argued): The only question involved in this motion, which I think at all necessary to pass upon, is the question whether this assignee can institute this proceeding in his personal capacity. I hold that he can sue either in his personal or representative capacity, and the motion will therefore be overruled. I have investigated the matter since adjournment with reference to whether an executor would be required to sue in a representative capacity, as was argued by counsel. I do not think that is necessary. The section of the Compiled Laws ex-
pressly authorizes an executor or trustee to sue in his per-
71 sonal capacity. As to the general rule in equity pleading, it
is held that the trustee could not maintain an action for the recovery of trust property without joining the *cestui que* trust. This I hold to be an exception as to assignees, and there are two authorities to which I would refer counsel. One is that of Magelland *vs.* Price, 48 N. Y., referred to in Burrell, and the other case is Ogden *vs.* Prentiss, 33 Barber, in which it is expressly held that the assignee may sue in his personal or representative capacity. I want it distinctly understood that the validity of this assignment is not in any manner involved, and with reference to this sale by Lord and Williams to Lord and Williams Company, that is a matter I wish to be fully presented in the final argument of the case.

Mr. MORGAN: We will not take an exception, then, if the question is left open.

The COURT: Exceptions are always understood to be taken to all the rulings of the court adverse to the party.

The defendant, to sustain the issues upon his part, introduced the following testimony:

Mr. MORGAN: The first paper I will introduce in evidence is the affidavit on attachment in the case of G. H. Thompson *vs.* Lord & Williams.

Mr. CAMPBELL: I object to the introduction of this paper
72 on the ground that it is not founded on any complaint, and
if the complaint is to be considered in, then I object to it on the ground that it is an evident fraud on the law on its face. That the complaint shows on its face that it is a contract not made or payable in this Territory.

The COURT: (After a long argument.) The objection is overruled.

Mr. MORGAN: It is as follows:

"In the district court of the first judicial district, Territory of Arizona, in and for the county of Pima. C. H. Thompson, plaintiff, *vs.* C. H. Lord and W. W. Williams, partners, doing business under the firm name and style of Lord & Williams, defendants.

Affidavit for Attachment.

TERRITORY OF ARIZONA, } ss.
County of Pima. }

G. H. Thompson being duly sworn says that he is the plaintiff in the above-entitled action that the defendants in said action are indebted to him in the sum of seventeen thousand seven hundred and thirty-four $\frac{14}{100}$ dollars over and above all legal set-offs and counter claims upon an express contract for the direct payment of money, to wit:

Upon certain checks and drafts and an assigned account
73 mentioned in the complaint herein, and that such contract was made and is payable in this Territory, and that the payment of the same has not been secured by any mortgage, lien, or pledge upon real or personal property.

That the sum for which the attachment is asked is a *bona fide* existing debt due and owing from the defendants to the plaintiff, and that the attachment is not sought, and the action is not prosecuted to hinder, delay, or defraud any creditor or creditors of the defendant.

G. HOWARD THOMPSON.

Subscribed and sworn to before me, this 28th day of October, A. D. 1881.

BENJ. MORGAN, [SEAL.]
Notary Public, Pima County, A. T.

(Endorsed:) Title of court and cause. Affidavit for attachment. Filed 28th Oct., 1881. G. A. Clum, clerk.

Mr. MORGAN: We will now offer the undertaking on attachment.

Mr. CAMPBELL: I object to this on the ground that it is a rejected undertaking.

The COURT: When was the writ issued?

Mr. CAMPBELL: The undertaking is dated October 28th, 1881, and in the first instance it was approved October 28th, 1881; that
74 is at the time it was given, and then of course the other parties had time to except to it, and exception was taken to the bond. On November 4th, 1881, six days after the writ of attachment, the undertaking was disapproved by the clerk.

Mr. MORGAN: I will make an explanation. My idea was this, I wanted to produce this evidence in its order. I have first introduced this undertaking of October 28, 1881, with the disapproval of the clerk on it. I intended to follow that up, if he had not undertaken to force the question upon me by showing that on the fourth of November we gave a new bond, as the statute required, upon the very same day that the surety was rejected.

The COURT: Well, I reckon that will settle the matter.

Mr. MORGAN: I will now offer the new and old bond. They are as follows:

(Title of Court and Cause.)

Whereas, The above-named plaintiff has commenced, or is about to commence, an action in the district court of the first judicial district of the Territory of Arizona, in and for the county of Pima, against the above-named defendant upon a contract for the direct payment of money, claiming that there is due to the said plaintiff from the said defendants the sum of $17,734.14, besides in-
75 terest, and is about to apply for an attachment against the property of the said defendants as security for the satisfaction of any judgment that may be recovered therein:

Now, therefore, we, the undersigned residents of the county of Pima, in consideration of the premises and of the issuing of the said attachment, do jointly and severally undertake in the sum of $17,734.14, and promise to the effect that if the defendant recover judgment, or if the attachment shall be discharged on the ground that the writ was improperly issued, the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the attachment, not exceeding the sum of $17,734.14.

CHARLES M. STRAUSS. [SEAL.]
P. R. TULLY. [SEAL.]

Dated this 28th day of October, 1881.

TERRITORY OF ARIZONA, } ss:
County of Pima, }

Charles M. Strauss and P. R. Tully, the sureties whose names are subscribed to the above undertaking being severally duly sworn, each for himself, says that he is a resident and freeholder in said Territory and county, and is worth the sum in said undertaking specified as the penalty thereof, over and above all his just
76 debts and liabilities, exclusive of property exempt from execution.

CHARLES M. STRAUSS.
P. R. TULLY.

Subscribed and sworn to before me, this 28th day of October, A. D. 1881.

[SEAL.] BENJ. MORGAN,
Notary Public.

Pima County, A. T.

Approved this 28th day of October, 1881.

G. A. CLUM, *Clerk.*

(Endorsed:) While I do not doubt but that Mr. Strauss is worth 18,000 dollars, the amount in the undertaking, I do not think it can be reached by execution, consequently he has not justified as contemplated by the statute, and must hold the bond to be insufficient.

G. A. CLUM, *Clerk.*

November 4th, 1881.

Undertaking on Attachment.

(Title of Court and Cause.)

Filed Oct. 28th, 1881.

Whereas the above-named plaintiff has commenced, or is about to commence, an action in the district court of the first judicial district of the Territory of Arizona, in and for the county of Pima, against the above-named defendants, upon a contract for the direct pay-
77 ment of money, claiming that there is due to the said plaintiff from the said defendants, the sum of $17,734.14, besides interest, and is about to apply for an attachment against the property of the said defendants as security for the satisfaction of any judgment that may be recovered therein:

Now, therefore, we, the undersigned residents of the county of Pima, in consideration of the premises, and of the issuing of the said attachment, do jointly and severally undertake in the sum of $17,734.14, and promise to the effect that if the defendant recover judgment, or if the attachment shall be discharged on the ground that the writ is improperly issued, the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the attachment, not exceeding the sum of $17,734.14.

ALBERT STEINFELD. [SEAL.]
P. R. TULLY. [SEAL.]

Dated this 4th day of November, 1881.

TERRITORY OF ARIZONA, } ss:
County of Pima, }

Albert Steinfeld and P. R. Tully, the sureties whose names are subscribed to the above undertaking, being severally duly sworn, each for himself says that he is a resident and freeholder in said Territory and county, and is worth the sum in said undertaking
78 specified as the penalty thereof, over and above all his just debts and liabilities, exclusive of property exempt from execution.

ALBERT STEINFELD.
P. R. TULLY.

Subscribed and sworn to before me, this 4th day of November, A. D. 1881.

GEO. A. CLUM. [SEAL.]

Approved this 4th day of November, A. D. 1881.

G. A. CLUM, *Clerk.*

(Endorsed:) (Title of court and cause.) New undertaking on attachment. Filed Nov. 4th, 1881. G. A. Clum, clerk.

Mr. MORGAN: I will now introduce the writ of attachment.

Mr. CAMPBELL: We object on the ground that the writ demands the sheriff to attach for more than is alleged to be due. The affida-

vit is for $17,734.14, and the writ is for $17,734.14 lawful money of the United States, besides interest at the rate of ten per cent. per annum from this date till paid, and five hundred dollars percentage and costs of suit. As a further objection, we derive our title from Lord and Williams Company, and an attachment against
79 Lord and Williams does not authorize the taking of property of Lord and Williams Company.

The COURT: The objection is overruled.

Mr. MORGAN: The writ of attachment has on it the return of the sheriff; I suppose you will admit that R. H. Paul was the sheriff of the county at that time?

Mr. CAMPBELL: Yes, sir; but I object to it on the ground that he appears to have attached the entire stock of Lord and Williams and holds the same in his possession.

The COURT: The objection is overruled and exception.

Mr. MORGAN: It reads as follows:

Writ of Attachment.

(Title of Court and Cause.)

The Territory of Arizona to the sheriff of Pima county, Greeting:

Whereas the above entitled action was commenced in the district court of the first judicial district of the Territory of Arizona, in and for the said county of Pima, by the plaintiff in the said action, to recover from the defendants, C. H. Lord and W. W. Williams, in the said action, the sum of seventeen thousand seven hundred and thirty-four $\frac{14}{100}$ dollars, ($17,734.14) lawful money of the United States, besides interest at the rate of ten per cent. per annum from this
80 date till paid, and five hundred dollars percentage and costs of suit, and the necessary affidavit and undertaking herein having been filed as required by law—

Now, we do therefore command you, the said sheriff, that you attach and safely keep all the property of said defendants, C. H. Lord and W. W. Williams, within your said county not exempt from execution, or so much thereof as may be sufficient to satisfy the said plaintiff's demand, as above mentioned; unless the said defendants give you security by an undertaking of at least two sufficient sureties in an amount sufficient to satisfy such demand, besides costs, or in an amount equal to the value of the property which has been or is about to be attached; in which case you will take such undertaking, and hereof make due and legal service and return.

Witness Hon. W. H. Stillwell, judge of the said district court of the first judicial district, this 28th day of October, A. D. 1881.

Attest my hand and the seal of said court the day and year last above written.

GEO. A. CLUM, *Clerk.* [SEAL.]

(Endorsed.)

I hereby certify that by virtue of the annexed writ of attachment

issued out of the district court of the first judicial district, in and for the county of Pima, Territory of Arizona, I attached
81 certain goods, wares, and merchandise, being the entire stock of Lord and Williams, and held the same in my possession until released by me on replevin suit brought by H. B. Cullum, assignee for said defendant.

R. H. PAUL, *Sheriff.*

(Title of court and cause.)
Writ of attachment. Filed Dec. 7th, 1881.

GEO. A. CLUM, *Clerk.*

Mr. MORGAN: We will offer now the judgment roll in the case of Thompson *vs.* Lord & Williams.

Mr. CAMPBELL: To this I will make all the objections I made before, and in addition that it is incompetent and irrelevant.

The COURT: The same ruling.

It is as follows:

Judgment Roll.

Complaint.

In the District Court of the First Judicial District of the Territory of Arizona, in and for the County of Pima.

G. H. THOMPSON, Plaintiff,

vs.

C. H. LORD and W. W. WILLIAMS, copartners doing business under the firm and copartnership name and style of Lord & Williams, Defendants.

82 The above-named plaintiff complains of said defendants, and for cause of action avers:

That the said defendants, C. H. Lord and W. W. Williams, now are and, during all of the times hereinafter mentioned, were copartners doing a banking and mercantile business in the city of Tucson, in the county of Pima, in the Territory of Arizona, under the copartnership and firm name and style of Lord & Williams.

That the Bank of California hereinafter mentioned is now and was, during all of the times hereinafter mentioned, a private corporation organized and existing under the laws of the State of California, and having its principal place of business in the city of San Francisco, in said State.

That the said defendants as copartners in the said firm name of Lord & Williams, at divers times and dates between the first day of January, 1881, and the 25th day of October, 1881, at the city of Tucson aforesaid, made and drew their checks and drafts in writing on the said the Bank of California, payable to the order of the diverse and sundry persons in said checks and drafts severally named, and then, and at the said city of Tucson, sold, transferred, and negotiated the same to said diverse and sundry persons, and then and there received full value therefor, and then and there de-

livered said checks and drafts to the said diverse and sundry persons.

83 That thereafter the said checks and drafts so issued and negotiated by said defendants were, by the persons holding the same, duly presented to the said the Bank of California, and delivered and transferred to it, and the said the Bank of California duly honored the same and paid to the holders thereof severally the amount in each check and draft severally specified.

That the checks and drafts so made, issued, sold, and negotiated by said defendants and so honored, received, and paid by said the Bank of California, amount in the aggregate to the sum of $17,310.89, which amount the said defendants then and there, and by the said checks and drafts aforesaid, promised and became obligated to pay.

That neither the whole or any part of said sum has been paid. That on or about the 26th day of October, 1881, the said the Bank of California, for a valuable consideration, sold, assigned, and transferred the said demand against the said defendants to the plaintiff, and he is now the owner thereof.

For another further and separate cause of action said plaintiff avers:

That now, and during all of the times hereinafter mentioned, the defendants, C. H. Lord and W. W. Williams, were copartners doing business at the city of Tucson, in said Territory, under the firm name and style of Lord & Williams.

84 That during all of the times hereinafter mentioned, L. Zeckendorf and Albert Steinfeld were copartners, doing business as merchants in the city of Tucson, under the firm name and style of L. Zeckendorf & Co.

That between the first day of January, 1881, and the 26th day of October, 1881, the said defendants became and were indebted to said firm of L. Zeckendorf & Co. in the sum of $423.25, balance of account for goods, wares, and merchandise, sold and delivered by said L. Zeckendorf & Co. to said defendants at their instance and request, which amount said defendants promised and agreed to pay to the said firm of L. Zeckendorf & Co.

That on or about the said 26th day of October, 1881, the said firm of L. Zeckendorf & Co., for value, transfered and assigned its said demand against said defendants to this plaintiff.

That neither the whole nor any part of said sum has been paid.

Wherefore plaintiff demands judgment against said defendants for the sum of $17,734.14, and for the sum of five hundred dollars the percentage allowed by law, and for costs of suit.

MORGAN, SILENT, & STEPHENS,
Att'ys for Plff.

TERRITORY OF ARIZONA, }
County of Pima, } *ss:*

85 G. H. Thompson, after being first duly sworn, upon his oath says that he has heard the foregoing his complaint read, and knows the contents thereof, and that the same is true of his own

knowledge, except as to those matters therein alleged on his information and belief, and that as to those matters he believes the same to be true.

G. HOWARD THOMPSON.

Subscribed and sworn to before me, this Oct. 28th, 1881.

BENJ. MORGAN, [SEAL.]
Notary Public, Pima County, A. T.

(Endorsed:) Title of court and cause. Complaint. Filed Oct. 28, 1881. G. A. Clum, clerk.

Summons.

(Title of Court and Cause.)

Action brought in the district court of the first judicial district, in and for the county of Pima, in the Territory of Arizona.

The Territory of Arizona sends greeting to C. H. Lord and W. W. Williams:

You are hereby summoned and required to appear in an action brought against you by the above-named plaintiff in the district court of the first judicial district in and for the county of
86 Pima, in the Territory of Arizona, and answer the complaint filed with the clerk of this court at Tucson, in said county (a copy of which complaint accompanies this summons) within twenty days (exclusive of the day of service) after the service upon you of this summons, if served in this county; but if served out of the county and within this district, then within thirty days: in all other cases, forty days.

The said action is brought by plaintiff to recover from said defendants the sum of seventeen thousand seven hundred and thirty-four .14 dollars ($17,734.14) due plaintiff upon drafts and checks, in writing, made by defendants, and which defendants have not paid; all of which will more fully appear by the complaint herein, a copy of which is hereto attached.

And you are hereby notified that if you fail to appear and answer the complaint, as above required, the plaintiff will take default and judgment against you for said sum of $17,734.14 and five hundred dollars percentage and costs and disbursements in this behalf expended.

Given under my hand and the seal of the said district court, at Tucson, this 28th day of October, A. D. 1881.

GEORGE A. CLUM, *Clerk.* [SEAL.]

(Endorsed:)

OFFICE OF THE SHERIFF, *County of Pima,* } ss:

87 I hereby certify that I received the within summons on the 28th day of October, A. D. 1881, and personally served the

same, on the 28th day of October, A. D, 1881, on W. W. Williams, being one of the defendants named in the summons, by delivering it and leaving with said defendants personally, in the county of Pima, a copy of said summons, together with a true and correct copy of the complaint in the action.

R. H. PAUL, *Sheriff*,
By J. J. COLEMAN,
Under Sheriff.

And I further certify that after due and diligent search I am unable to find C. H. Lord, the remaining defendant, within my county.

R. H. PAUL, *Sheriff*,
By J. J. COLEMAN,
Under Sheriff.

I hereby certify that I received the within summons on the 28th day of October, A. D. 1881, and personally served the same on C. H. Lord personally, in the county of Pima, being one of the defendants named in said summons, by delivering to and leaving with said C. H. Lord, in the county of Pima, on the 9th day of January, A. D. 1882, a copy of said summons, together with a true and correct copy of the complaint in the action.

R. H. PAUL, *Sheriff*,
By J. J. COLEMAN,
Under Sheriff.

88 (Endorsed:) Title of court and cause—summons. Filed Dec. 9, 1881. G. A. Clum, clerk.

Default.

(Title of Court and Cause.)

In this action the defendants herein, having been regularly served with process, and having failed to appear and answer the complaint herein, and the time allowed by law having expired, and no answer or demurrer having been filed, now, on application of plaintiff's attorneys, the default of said defendants in the premises is hereby duly entered according to law.

Attest my hand and seal of court, this 17th day of February, 1882.

GEO. A. CLUM, *Clerk.* [SEAL.]

(Endorsed:) Title of court and cause—default. Filed Feb. 17, A. D. 1882. Geo. A. Clum, clerk.

Judgment.

(Title of Court and Cause.)

In this action, the defendants, C. H. Lord and W. W. Williams, having been regularly and personally served with summons, and having failed to appear and answer the plaintiff's complaint
89 herein, and the legal time for answering having expired, and the default of said defendants in the premises having been duly entered according to law:

Now, at this day, on application of Morgan, Silent and Stephens, the attorneys for plaintiff, it is ordered that judgment be entered herein against the said defendants, C. H. Lord and W. W. Williams, in accordance with the prayer of plaintiff's complaint on file herein.

Wherefore, by reason of the law and the premises aforesaid, it is ordered and adjudged that G. H. Thompson, the said plaintiff, do have and recover of and from the said defendants, C. H. Lord and W. W. Williams, the sum of seventeen thousand seven hundred and thirty-four $\frac{14}{100}$ dollars ($17,734.14), with interest thereon at the rate of ten per cent. per annum, from date until paid, together with said plaintiff's costs and disbursements incurred in said action, amounting to and taxed at the sum of six hundred seventy-eight $\frac{13}{100}$ dollars, and that execution issue therefor.

Judgment recorded and entered this Feb'y 17, 1882. Attest my hand and seal of court the day and year last above written.

[SEAL.] GEO. A. CLUM, *Clerk.*

90 (Endorsed:) Title of court and cause—judgment. Filed Feb. 17th. Geo. A. Clum, clerk.

Certificate.

TERRITORY OF ARIZONA, } ss:
County of Pima, }

I, George A. Clum, clerk of the district court in and for Pima county, Territory of Arizona, do hereby certify that the foregoing is a full, true and correct judgment roll in the case entiled G. H. Thompson *vs.* Lord and Williams, as appears to me of record.

Attest my hand and seal of court, this 17th day of Feb'y, 1882.

[SEAL.] GEO. A. CLUM.

(The judgment roll is endorsed as follows:)

(Endorsed:) Title of court and Cause. Judgment roll. Filed Feb. 17th, 1882. Geo. A. Clum, clerk.

Testimony on the part of Plaintiff in Rebuttal.

W. W. WILLIAMS, called for the plaintiff in rebuttal, sworn and examined, testified as follows:

Mr. CAMPBELL: Q. Now what was done in relation to any attempt of these parties to assist you?

A. Oh, I could not state it all.

Q. Yes, you can state it all as well as not, all within your knowledge, right straight along?

91 A. He came to the office in the first place and consulted with me, and stated that the concern must not stop—if possible it must go on.

Mr. MORGAN: Q. What concern?

A. The firm.

Q. What firm?

Mr. CAMPBELL: I object to counsel interfering in my examination.

Mr. MORGAN: I have a right to know what he is talking about so I may cross-examine him about it.

The COURT: Counsel has a right to understand what the witness says, but it is not proper to cross-examine the witness when he is being examined in chief.

Mr. MORGAN: State what firm you had reference to?

A. Well, Mr. Morgan, it would be very hard to draw the line between them, because if one firm stopped, the other must.

Q. The lines between what firms would be hard to be drawn?

A. Well, in speaking of the affairs of course we spoke of Lord and Williams. I could not tell you which firm we had reference to.

Mr. CAMPBELL: Q. Now then, what then?

92 A. As I told you, there was so many things took place that I cannot tell you. After examining the books we spent the best part of the day, I believe, over to Mr. Morgan's office.

Q. Who did?

A. Mr. Dunn; I believe that evening or that afternoon he came to the conclusion he would make the offer of fifty cents.

Q. Mr. Morgan was then representing the Bank of California?

A. Yes, sir. At first he thought much more favorable of the standing of the concern, but after he found that the contracts were so mixed up with it he then came to the conclusion that he would offer fifty per cent. of all the liabilities; that he would purchase the liabilities and pay fifty cents on the dollar.

Q. All the liabilities of both firms?

A. Yes, sir.

Q. That was an offer to the creditors?

A. Yes, sir.

Q. What was he to receive in return for that?

A. Well, all were to surrender their claims to him, or H. B. Claflin & Co., and the assets were to be turned over.

Q. He was willing to give fifty cents for all the assets of the concern, provided the creditors all consented?

A. Yes, sir.

Mr. MORGAN: He said fifty per cent. of the liabilities; nothing was said about assets.

93 Mr. CAMPBELL: Yes; that is it. Now, there was a limit placed on that?

A. How do you mean?

Q. As to the amount of the liabilities?

A. That I do not remember.

Q. You do not?

A. No, sir; as I stated, he examined the liabilities very carefully, and he decided to offer fifty cents on the dollar, if the creditors would all consent within so many days—I forget the number of days. Some of those stipulations probably were made with other parties. I was not present but very little during the outside talk.

Q. Do you say you had a little difference with Mr. Dunn?

A. Yes, sir; a little discussion in the fore part of the evening, and for that reason I was not present.

Q. What was that in reference to that you had that difference with him?

Mr. MORGAN: Well, I object to that.

Mr. CAMPBELL: I want to get at the relations of these parties. It is claimed that there is a fraudulent conspiracy here; I want to see just how much of a fraudulent conspiracy there was.

The COURT: Did this difference grow out of your business relations?

94 A. Not out of our business relations; something that took place that evening, or something I stated was to take place.

Mr. CAMPBELL: Q. What was it?

The COURT: Let us hear it.

A. It has been stated here before. It was in connection with the appointment of Mr. Hamburg as a man to manage the sale of the goods.

Mr. CAMPBELL: Q. At that time you were in hopes of getting out, were you not?

A. I did not expect it would be over thirty or forty days before we straightened out.

Q. And you wanted somebody to take charge of the goods there that would sell them, as you thought, to greater advantage than Mr. Hamburg would?

A. Perhaps that was an injustice to Mr. Hamburg; he was an able salesman, but I do not think it was right for him, being a partner in a rival house at the time, to be put there.

Q. Now these telegrams have been spoken of here, these exhibits that were offered that you received from Dr. Lord.

Mr. MORGAN: He testified about that and then came back and took it all back.

The COURT: There is no use in going over these matters again; of course, if there is any matter he has not testified to, you may bring it out.

95 Q. How long did Mr. Harlow have the management of the business of the Lord and Williams Company?

A. From its conception till the assignment.

Q. Did he have anything to do with the other business, the business of Lord and Williams?

A. No, not pertaining to the firm.

Q. He had nothing to do with any thing but the mercantile business?

A. No, not that I know of; I do not think of anything now; I think that was the understanding, that he should not have.

Q. Now, at any time after this assignment did you in any way make or come to any arrangement with Mr. Cullum, for the purpose of getting into your hands any of the assets of Lord and Williams Company, or Lord and Williams, at any time after the assignment?

A. What is the question?

Q. Did you at any time after the assignment enter into any ar-

rangement with Mr. Cullum to enable you to get hold of any of the assets of Lord & Williams, or Lord & Williams Company?

A. No, sir; I do not recollect of having any such conversation. Not a single thing in connection with it.

Cross-examination:

96 Mr. MORGAN: Q. Now I understood you to say that the lines were hard to be determined between Lord & Williams and Lord & Williams Company, what do you mean by that?

A. What I meant to say was, that I do not know whether Mr. Dunn was very particular to say Lord & Williams or Lord & Williams Company.

Q. You said the lines were hard to be drawn between Lord & Williams and Lord & Williams Company; explain what you mean by that?

A. I meant in case of the resumption of the houses, if the firm had made payment, that is if Mr. Dunn had made this settlement; I understood him to make this statement to me, he said you cannot afford to stop—there is no necessity of it. That was when he first arrived.

Q. Is it not a fact, Mr. Williams, that the lines were hard to be drawn between the mercantitle house of Lord & Williams and Lord & Williams Company?

A. Not in this sense. If you wish for me to explain that, I will so far as I am concerned.

Q. Is it not hard for you to draw the lines distinctly between Lord & Williams and Lord & Williams Company as to the mercantile firm?

A. The whole mercantile interest was turned over. There were reasons for it; if you like, I will state.

Q. Well, state.

97 A. In the first place, Dr. Lord thought there was more money in some outside matters, and he wanted to have the time and opportunity to attend to the outside matters, as he had bought the water franchise, or intended to buy it, and the street railroad and some other matters, and I wanted to go East, as I had been here nearly seven years with the exception of two months, and the understanding was that we would form this partnership and take in Mr. Harlow, sell him the goods, and on the first of May I was going East to spend the summer; that had been promised to me for two or three years; he was to return and attend to the business and other outside matters, and these contracts; he wanted more time to attend to the contracts, as he was satisfied there was more money in those than in the mercantile business.

Q. Is it not a fact that Mr. Harlow was employed to supervise the sale of the merchandise of Lord & Williams, for which service he was to receive two-tenths of the profits?

A. I will tell you.

Q. Just answer that question.

A. It was a compromise that we should have nothing to do with that business.

Q. In other words, you employed Mr. Harlow to take supervision of the mercantile firm of Lord & Williams, for which he was to receive as compensation two-tenths of the profits, is not that it?

98 A. No, sir; not at all.

Q. Your agreement was in writing?

A. I tell you. I suppose there was two weeks' discussion before those partnership papers could be agreed to.

Q. Do you understand my question?

A. I do.

Q. Can you answer it?

A. Ask it again.

Q. Do you not know as a fact that the firm of Lord & Williams employed C. E. Harlow to supervise the sale of the merchandise belonging to the firm of Lord & Williams, for which services Mr. Harlow was to receive two-tenths of the profits on the goods sold?

A. No, sir; that was not the understanding.

Q. Well, what was the understanding?

Mr. CAMPBELL: I suppose the understanding was reduced to writing.

Mr. MORGAN: Well, you can't answer it, and the judge objects. Now, you say that Mr. Harlow never had anything to do with the firm of Lord & Williams?

A. He had nothing to do with Lord & Williams, except in some questions which might arise where he might act for the Dr. as his power of attorney.

Q. C. E. Harlow purchased what interest in the goods?

99 A. As I understand it, he did not purchase any interest in the goods. The goods were sold to Lord & Williams Company, and at the end of the year of course he was to share certain profits, if there were any profits, and certain of the losses, if there were any losses.

Q. Then C. E. Harlow paid not a dollar in the purchase of those goods from Lord & Williams?

A. No, sir.

Q. Lord & Williams never transferred any goods to C. E. Harlow, did they?

A. They sold the goods to Lord & Williams Company. The books show that.

Q. Are the books correct?

A. They should be.

Q. Let me show you an entry in the books. Were you familiar with the books of Lord & Williams Company?

A. No, sir; I do not think I looked at them more than two or three times.

Q. You do not know much about the books?

A. No, sir.

Q. You were interested in the firm of Lord & Williams?

A. It has been stated, and it is unpleasant for me to state the reasons why I did not care particularly to go in there, and, as long as I thought everything was all right, I did not go.

100 Q. Now, I will ask you to explain what is this entry in the journal of Lord & Williams Company, if you can, made on the 16th of April, 1881. I notice on this journal, "Merchandise debtor to Lord & Williams stock account, $69,000," in the books of Lord & William Company. How do you explain that?

A. That shows that Lord & Williams Company owed that amount.

Q. That is just simply an entry to show how much Lord & Williams Company were indebted to Lord & Williams?

A. If you will look at the other book you will see that there are the same entries made there. The merchandise account is where Lord & Williams received credit on this account, and is charged to Lord & Williams Company, and whenever they found any goods not in good order, they charged them back and would not receive them.

Q. Then on the 16th of April, that is a correct charge in Lord & Williams Company's books, and Lord & Williams stock account, they were indebted to merchandise $69,000 stock and so forth.

A. I do not see any necessity of stock account; the bookkeeper might have put that on, but it was a fact that Lord & Williams should receive credit for that amount, if that was a correct inventory, which I suppose the other books show.

101 *Assignment of Errors and Grounds upon which Appellant will rely upon Appeal.*

I.

The Court erred in refusing to sustain the objection made by defendant to the introduction of the power of attorney offered by the plaintiff.

II.

The court erred in permitting the articles of agreement of the partnership between Lord and Williams Company to be read in evidence against defendant's objection.

III.

The court erred in admitting in evidence the assignment made by Lord and Williams Company to plaintiff Cullum, against defendant's objection.

IV.

The court erred in refusing to grant the motion made by defendant to strike out the testimony introduced by plaintiff in the case, on the ground of variance between it and the allegations of the complaint.

V.

The court erred in refusing to pass upon and grant defend-
102 ant's motion for a nonsuit made on the conclusion of plaintiff's cause, on the ground that the plaintiff had failed to make out his cause of action as alleged in his complaint.

VI.

The defendant assigns, as further ground of error, the insufficiency of said findings of fact to warrant or support the judgment in favor of plaintiff, on the ground that said findings show that the plaintiff, H. B. Cullum, held said property by virtue of the assignment of Lord and Williams Company and as trustee for the purpose of paying the creditors of said firm; that at the time of the levying of the attachment in the case *versus* Lord and Williams by the defendant herein, by virtue of which he took possession of said goods, no creditor of said firm had assented to said assignment or become a party thereto in any way.

VII.

Also, that there is no evidence that at the time of the making of the said assignment there were any creditors of Lord and Williams Company, for whose benefit said assignment was made and said Cullum claimed to hold said property.

The defendant further shows, as error, the insufficiency of the evidence to justify the findings of fact and conclusions of law herein, upon the following grounds:

103 To the first finding of fact he assigns as follows:

A.

There was no evidence offered or given in the case to sustain the finding of fact that on the 25th day of October, 1881, at the city of Tucson, Charles H. Lord, W. W. Williams, and C. E. Harlow, then, and for several months before that time, composed the mercantile firm of Lord and Williams Company.

B.

There was no evidence offered and none given in this case to sustain or prove the finding of fact that a general assignment of all their property not exempt from execution, for the equal benefit of all their creditors, was made to Henry B. Cullum, the plaintiff in this action.

C.

There was no evidence to support the finding of fact that the property mentioned in the complaint was, at the date of the assignment, a portion of the property of said Lord and Williams Company, or that said Lord and Williams Company had at that time, or ever had any right, title, or interest to said property, or any part of the same.

104 D.

There was no evidence offered to prove, and none given tending to prove that the assignment mentioned in the first finding of fact was executed in the firm name by W. W. Williams, or that it was signed by said Williams and said Harlow individually, or that said Lord, by his attorney, the said C. E. Harlow signed the same, or

that the power of attorney introduced in evidence, from C. H. Lord to C. E. Harlow, was any authority for the said Harlow's signing said assignment.

To the second finding of fact he assigns as follows:

A.

There was no evidence offered in this cause to prove that on the 25th day of October, 1881, the said firm of Lord and Willia m were insolvent.

B.

There was no evidence introduced to prove that upon said day the firm of Lord and Williams made and executed a general assignment of all its property, not exempt from execution, for the equal benefit of all the creditors, to Henry B. Cullum, the plaintiff herein.

105 C.

There was no evidence introduced to prove that said assignment was executed in the firm name by said Williams, and also signed by him individually, and by said Harlow as Lord's attorney-in-fact.

To the third finding of fact he assigns as follows:

A.

There was no evidence introduced to prove that said assignments were made in good faith by said firms. The only evidence being that said firm of Lord and Williams Company made said alleged assignment because of the threatened attachment suit on the part of the Bank of California.

To the fourth finding of fact he assigns as follows:

A.

There was no evidence introduced proving, or tending to prove, that the property seized by the defendant herein as sheriff, on the attachment in the suit of G. Howard Thompson *vs.* Lord and Williams, was the property of the plaintiff herein, and was not subject to such seizure and attachment.

106 And defendant further assigns as ground of error that the court erred in finding, as a conclusion of law, that the property in the complaint, mentioned and described, was wrongfully taken and detained by the defendant from the possession of the plaintiff, for the reason that there was no evidence to justify the finding of fact upon which said conclusion of law rests.

Also, that the court erred in ordering judgment to be entered herein in favor of plaintiff and against the defendant on the ground that the evidence was insufficient to warrant the findings of facts and conclusions of law upon which said order is based; and further that said order, and said judgment, and said findings of fact, and conclusions of law are, each and all, contrary and against the evidence herein, in this:

A.

The evidence establishes that on the 28th day of October, A. D. 1881, the mercantile firm of Lord and Williams were indebted to G. Howard Thompson in the sum of seventeen thousand seven hundred and thirty-four $\frac{14}{100}$ dollars ($17,734.14).

B.

That on said day he commenced an action in the district court of the first judicial district, Territory of Arizona, in and for the
107 county of Pima, against Lord and Williams for the recovery of said sum, and obtained, at the time of the issuance of the summons, a writ of attachment against the property of said firm.

C.

That said writ was executed by the sheriff by levying upon the goods, wares, and merchandise belonging to said firm.

D.

That said goods, wares and merchandise so levied upon were, at the time of such levy, the property of Lord and Williams.

E.

That said goods, wares, and merchandise were, subsequent to said levy, taken from the possession of said sheriff, defendant herein, by writ of replevin in the within entitled suit.

F.

That the only claim or title to the property set forth in the complaint herein, on the part of the plaintiff, was by virtue of the assignment claimed to have been made to him by Lord & Williams Company.

EARLL & CAMPBELL,
Att'ys for Pl'ff.
BEN. MORGAN,
Att'y for Def't.

108 *Stipulation.*

It is hereby stipulated that the foregoing statement on appeal is agreed to by the undersigned counsel for the respective parties, and that the same may be used on appeal from the judgment herein.

EARLL & CAMPBELL,
Atty's for Pl'f.

BEN. MORGAN,
Att'y for Def't.

(Endorsed:) Filed October 31st, 1884. C. S. Jeffords, clerk, by J. A. Anderson, Jr., dep.

Notice of Appeal.

(Title of Court and Cause.)

To the clerk of said court and Messrs. Earll and Campbell, attorneys for the plaintiff:

You will please take notice that the defendant in the above-entitled action, hereby appeals to the supreme court of the Territory of Arizona, from the judgment therein entered in said district
109 court on the 11th day of October, A. D. 1884, in favor of plaintiff in said action and against said defendants, and from the whole thereof. Yours, etc.,

BEN. MORGAN,
Attorney for Defendant.

Tucson, A. T., October 31st, 1884.

(Endorsed:) Service of the within notice of appeal is hereby admitted this 31st day of October, A. D. 1884, after the filing of the same. Earll & Campbell, attorneys for plaintiffs.

(Endorsed:) Filed October 31st, 1884. C. S. Jeffords, by J. A. Anderson, Jr., dep.

Undertaking on Appeal.

(Title of Court and Cause.)

Whereas, the defendant in the above-entitled action has appealed to the supreme court of the Territory of Arizona from the judgment made and entered against him in said action in the said district court, in favor of the plaintiff in said action, on the 11th
110 day of October, 1884, for the return of certain goods, wares, and merchandise and costs of suit, amounting to the sum of $539, and from the whole thereof.

Now, therefore, in consideration of the premises and of such appear we, the undersigned, residents of the county of Pima, Territory of Arizona, do hereby jointly and severally undertake and promise on the part of the appellant, that the said appellant will pay all damages and costs which may be awarded against him on the appeal or on a dismissal thereof, not exceeding three hundred dollars, to which amount we acknowledge ourselves jointly and severally bound.

Witness our hands and seals, this 31st day of October, A. D. 1884.

B. M. JACOBS.
WM. A. SCOTT, JR.

TERRITORY OF ARIZONA, } ss:
County of Pima, }

B. M. Jacobs and Wm. A. Scott, Jr., the persons named in and who subscribed the foregoing undertaking as the sureties thereupon, being severally duly sworn, each for himself and not one for the other, says that he is a resident, a freeholder in the county of Pima, Territory of Arizona, and that he is worth double the amount specified

in said undertaking as the penalty thereof, over and above
111 all his just debts and liabilities, exclusive of property exempt from execution.

B. M. JACOBS,
WM. A. SCOTT, JR.

Subscribed and sworn to before me, this 31st day of October, A. D. 1884.

[SEAL.] A. E. JACOBS,
Notary Public, Pima County, A. T.

(Endorsed:) Filed October 31st, 1884. C. S. Jeffords, clerk, by J. A. Anderson, Jr., deputy.

Stipulation.

(Title of Court and Cause.)

It is hereby stipulated and agreed by the attorneys for the respective parties hereto, that the foregoing judgment roll and statement on appeal, with the assignment of errors, notice of appeal, are full, true, and correct copies of the originals on file in the office of the clerk of said court, with their endorsements; and it is also stipulated and agreed by and between the attorneys for the respective parties hereto, that an undertaking on appeal from the judgment, in
112 due form, on behalf of said defendant and appellant has been properly filed with the clerk of said court, and that this transcript on appeal may be used in the Supreme Court on the hearing of the appeal from the judgment herein.

EARLL & CAMPBELL,
Attorneys for Plaintiff.
BEN. MORGAN,
Attorney for Defendant.

113 Service hereof admitted and copy received this 22d day of Nov'r, 1884.

EARLL & CAMPBELL,
Attorneys for Respondent.

114 SUPREME COURT, } ss:
Arizona Territory, }

I, A. E. Foote, clerk of the supreme court of the Territory of Arizona, do hereby certify the above and foregoing to be a full, true, and correct copy of the original transcript on appeal, in the cause [of] H. B. Cullum *vs.* R. H. Paul, with the endorsement of filing thereon now upon file in my office.

In witness whereof, I have hereunto set my hand and affixed the seal of the said supreme court, this the 15th day of June, A. D. 1885.

[Seal United States Supreme Court, Arizona.]

A. E. FOOTE,
Clerk of the Supreme Court of the Territory of Arizona.

115 In the Supreme Court of the Territory of Arizona.

Court met Tuesday March 3d, 1885, at ten o'clock a. m., pursuant to adjournment.

Present: Hon. Sumner Howard, chief justice; Hon. W. F. Fitzjerald, associate justice; J. A. Zabriskie, Esq., U. S. attorney; Zan L. Tidball, Esq., U. S. marshal; A. E. Foot, clerk, crier, and bailiff.

H. B. CULLUM, Plaintiff & Respondent,

vs.

R. H. PAUL, Defendant & Appellant.

It is by the court ordered that the judgment of the lower court be affirmed, Associate Justice Pinney dissenting, and directs that his dissent be minuted

Court adjourned *sine die.*

SUMNER HOWARD,
Chief Justice.
W. F. FITZGERALD,
Associate Justice.

116 Supreme Court, Arizona Territory

I, A. E. Foote, clerk of the supreme court of the Territory of Arizona, do hereby certify the above and foregoing to be a full, true, and correct copy of the judgment and order of the court in the cause of H. B. Cullum *vs.* R. H. Paul, made and entered in the minutes of said court on the 3d day of March, 1885, in minute book 1, on page 423, now in my office.

In witness whereof I have hereunto set my hand and affixed the seal of said supreme court, this the 15th day of June, A. D. 1885.

[Seal United States Supreme Court, Arizona.]

A. E. FOOTE,
Clerk Supreme Court, Arizona Territory.

117 In the Supreme Court of the Territory of Arizona.

H. B. CULLUM, Appellee, *vs.* R. H. PAUL, Appellant.

In the above-entitled cause an appeal is hereby allowed to the Supreme Court of the United States.

Dated this 5th day of June, A. D. 1885.

SUMNER HOWARD,
Chief Justice, Territory of Arizona.

Endorsed: Filed June 5th, 1885. A. E. Foote, clerk supreme court, Arizona Territory.

118 SUPREME COURT, *Arizona Territory,* } *ss:*

I, A. E. Foote, clerk of the supreme court of the Territory of Arizona, do hereby certify the above and foregoing to be a full, true,

and correct copy of the order allowing appeal in the cause of H. B. Cullum *vs.* R. H. Paul, with the endorsement of filing thereon, now upon file in my office.

In witness whereof I have hereunto set my hand and affixed the seal of said supreme court, this the 15th day of June, A. D. 1885.

[Seal United States Supreme Court, Arizona.]

A. E. FOOTE,
Clerk Supreme Court, Arizona Territory.

119 Supreme Court of the United States.

H. B. CULLUM, Plaintiff Appellee,

vs.

R. H. PAUL, Defendant Appellant.

Know all men by these presents that we, William E. Hazeltine and Ed. W. Wells, of Prescott, Yavapai county, Territory of Arizona, are held and firmly bound unto H. B. Cullum, appellee, in the sum of twenty-five hundred ($2,500) dollars to be paid to the said H. B. Cullum, his executors, or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators firmly by these presents. Sealed with our seals and dated this 5th day of June, A. D. 1885.

Whereas the above-named, R. H. Paul has taken an appeal to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled cause by the supreme court of the Territory of Arizona:

Now, therefore, the condition of this obligation is such that
120 of the above-named R. H. Paul shall prosecute and maintain said appeal and answer all costs and damages if he shall — to make good his plea in said appeal, then this obligation shall be void; otherwise, to remain in full force and virtue.

WILLIAM E. HAZELTINE. [SEAL.]
ED. W. WELLS. [SEAL.]

UNITED STATES OF AMERICA, } ss:
Territory of Arizona, }

William E. Hazeltine and Ed. W. Wells, each being duly sworn, depose and says, and each for himself saith, that he is worth the sum of twenty-five hundred ($2,50-) dollars over and above all his just debts and liabilities and above his property exempt from execution.

WILLIAM E. HAZELTINE.
ED. W. WELLS.

Sworn and subscribed to before me this 5th day, of June, 1885.

[SEAL.] EUGENE PANNENBERG,
Notary Public.

121 I approve the above bond and the sufficiency of the sureties thereto.

SUMNER HOWARD,
Chief Justice Supreme Court, Territory of Arizona.

Endorsed: Filed June 5th, 1885. A. E. Foote, clerk supreme court, Arizona Territory.

122 SUPREME COURT, *Arizona Territory,* } *ss:*

I, A. E. Foote, clerk of the supreme court of the Territory of Arizona, do hereby certify the above and foregoing to be a full, true, and correct copy of the supersedeas bond in the cause of H. B. Cullum *vs.* R. H. Paul, with the endorsement of filing thereon, now upon file in my office.

In witness whereof I have hereunto set my hand and affixed the seal of said supreme court, this the 15th day of June, A. D. 1885.

[Seal United States Supreme Court, Arizona.]

A. E. FOOTE,
Clerk Supreme Court, Arizona Territory.

123 SUPREME COURT, *Arizona Territory,* } *ss:*

I, A. E. Foote, clerk of the supreme court of the Territory of Arizona, do hereby certify the foregoing to be a full, true, and complete record on appeal in the cause of H. B. Cullum *vs.* R. H. Paul, appealed to the Supreme Court of the United States from said supreme court of Arizona Territory.

Witness my hand and the seal of said court, this the 15th day of June, A. D. 1885.

[Seal United States Supreme Court, Arizona.]

A. E. FOOTE,
Clerk Supreme Court, Arizona Territory.

124 UNITED STATES OF AMERICA, *ss:*

To Henry B. Cullum, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at the city of Wash- A. D. 1885, pursuant to an order filed in the clerk's office of the ington, in the District of Columbia, on the second Monday of October, supreme court of the Territory of Arizona, wherein R. H. Paul of the Territory of Arizona is appellant, and you appellee, to show cause, if any there be, why the judgment in the said cause mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable Sumner Howard, chief justice of supreme court, Territory of Arizona, this 5th day of June, A. D. 1885, and

of the Independence of the United States, the one hundred and ninth.

[Seal United States Supreme Court, Arizona.]

SUMNER HOWARD,
Chief Justice Supreme Court of Arizona.

125 [Endorsed:] United States Supreme Court. H. B. Cullum, appellee, *vs.* R. H. Paul, appellant. Citation. Filed June 5th, 1885. A. E. Foote, clerk supreme court, Arizona Territory. Service acknowledged waiving no rights whatever. June 25, 1885. Earll & Campbell, att'ys for H. B. Cullum.

Endorsed on cover: Arizona Territory supreme court. No. 893. R. H. Paul, appellant, *vs.* H. B. Cullum. Filed July 24, 1885.

57 In the Supreme Court of the Territory of Arizona.

Court met Friday, July 9th, 1886, at 9 o'clock a. m., pursuant to adjournment.

Present: His honor W. H. Barnes, associate justice; his honor Wm. W. Porter, associate justice; Owen T. Rouse, Esq., U. S. attorney; W. K. Meade, Esq., U. S. marshal; E. B. Dodge, Esq., clerk, by deputy; sheriff, crier, and bailiff.

H. B. CULLUM *vs.* R. H. PAUL.

The motion for a rehearing in this cause having been submitted to the court, it is by the court ordered that the same be denied.

Upon motion of Ben Morgan, counsel for appellant, an appeal is hereby allowed from this court to the Supreme Court of the United States.

Court adjourned *sine die*.

W. H. BARNES,
Associate Justice.
WM. W. PORTER,
Associate Justice.

58 SUPREME COURT, } *ss:*
Arizona Territory, }

I, E. B. Dodge, clerk of the supreme court of the Territory of Arizona, do hereby certify the above and foregoing to be a full, true, and correct copy of the minute order denying the petition for a rehearing and of the minute order allowing an appeal to the Supreme Court of the United States, in the cause of H. B. Cullum *vs.* R. H. Paul, made and entered in the minutes of said court on the 9th day of July, 1886, in minute-book 2, on pages 11 and 13 respectively, now in my office.

In witness whereof I have hereunto set my hand and affixed the seal of said court this the 1st day of Sept., A. D. 1886.

[Seal United States Supreme Court, Arizona.]

E. B. DODGE,
Clerk Supreme Court, Arizona Territory,
By ED. H. COOK, *Deputy.*

59 Supreme Court of the United States.

H. B. CULLUM, Plaintiff, Appellee,
vs.
R. H. PAUL, Defendant, Appellant.

Know all men by these presents that we, William E. Hazeltine and Ed. W. Wells, of Prescott, Yavapai county, Territory of Arizona, are held and firmly bound unto H. B. Cullum, appellee, in the sum of twenty-five hundred ($2,500) dollars, to be paid to the said H. B. Cullum, his executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 11th day of August, 1886.

Whereas the above-named R. H. Paul has taken an appeal to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled cause by the supreme court of the Territory of Arizona: Now, therefore, the conditions of this obligation is such that if the above-named R. H. Paul shall prosecute and maintain said appeal and answer all costs and damages if he shall fail to make good his plea in said appeal, then this obligation shall be void; otherwise to remain in full force and virtue.

60 W. E. HAZELTINE.
ED. W. WELLS.

UNITED STATES OF AMERICA, } ss:
Territory of Arizona, }

William E. Hazeltine and Ed. W. Wells, each being duly sworn, depose and say, and each for himself saith, that he is worth the sum of twenty-five hundred ($2,500) dollars over and above all his just debts and liabilities — above his property exempt from taxation.

W. E. HAZELTINE.
ED. W. WELLS.

Subscribed and sworn to before me this 11th day of August, 1886.
[SEAL.] E. B. DODGE, *Clerk,*
By ED. H. COOK, *Deputy.*

I approve the above bond and the sufficiency of the sureties thereto.

J. C. SHIELDS,
Chief Justice Supreme Court, Territory of Arizona.

Endorsed; Filed Aug. 11th, 1886. E. B. Dodge, clerk, by Ed. H. Cook, deputy.

61 SUPREME COURT, } ss:
Territory of Arizona, }

I, E. B. Dodge, clerk of the supreme court of the Territory of Arizona, do hereby certify the above and foregoing to be a full, true, and correct copy of the supersedeas bond in the cause of H. B. Cullum *vs.* R. H. Paul, with the endorsement of filing thereon, now upon file in my office.

In witness whereof I have hereunto set my hand and affixed the seal of said supreme court this 1st day of September, A. D. 1886.

[Seal United States Supreme Court, Arizona.]

E. B. DODGE,
Clerk Supreme Court, Arizona Territory.
By ED. H. COOK, *Deputy.*

62 SUPREME COURT, } ss:
Arizona Territory, }

I, E. B. Dodge, clerk of the supreme court of the Territory of Arizona, do hereby certify the foregoing to be a full, true, and complete record on appeal in the cause of H. B. Cullum *vs.* R. H. Paul, appealed to the Supreme Court of the United States from said supreme court of Arizona Territory.

Witness my hand and the seal of said court this 1st day of September, 1886.

[Seal United States Supreme Court, Arizona.]

E. B. DODGE,
Clerk Supreme Court Arizona,
By ED. H. COOK, *Deputy.*

[Stamped:] Supreme Court U. S. Received Sep. 22, 1886. Clerk's office.

63 UNITED STATES OF AMERICA, *ss:*

To Henry B. Cullom, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at the city of Washington, in the District of Columbia, on the 11th day of October, A. D. 1886, pursuant to an order allowing an appeal from the final decision of the supreme court of Arizona in a cause wherein R. H. Paul is appellant and you are appellee, to show cause, if any there be, why the said judgment and decision in the said cause mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable John C. Shields, chief justice of the supreme court of the Territory of Arizona, this 10th day of August, A. D. 1886, and of the Independence of the United States the one hundred and eleventh.

[Seal United States Supreme Court, Arizona.]

J. C. SHIELDS,
Chief Justice.

Attest: E. B. DODGE, *Clerk,*
By ED. H. COOK, *Deputy.*

64 STATE OF CALIFORNIA, }
County of Los Angeles, } *ss:*

Stephen M. White, being first duly sworn, deposes and says that he is a citizen of the United States, 33 y'rs of age, & not a party to, att'y in, or in any manner interested in the within matter; he served the within citation upon the att'ys for said appellee on the 18th day of Aug., 1886, by delivering upon that day to Alexander Campbell, Esq., who is the same Campbell whose name appears as a member of the firm of Earll, Campbell & Stephens & the same Campbell who has been att'y for said appellee, a true copy of this citation. The same was by me so delivered to said Campbell personally on the day above mentioned & between the hours of 9 a. m. & 4 p. m. of said day, at his office, in Temple Block, Los Angeles city, Cal. Said Campbell then & there wrote all that part of the endorsement hereon which follows the erased or crossed words & figures "Service accepted this — day of August, 1886," but after writing the same he erased the matter he had so written, stating that he did not desire to accept such service; that he had, as a member of said firm, attended

to said case as att'y for said appellee, but had not been retained to proceed further with the cause.

STEPHEN M. WHITE.

Subscribed & sworn to before me this 19th day of Aug., 1886.

C. H. DUNSMOOR,
County Clerk and Ex-Officio Clerk of the Superior Court,
By L. J. THOMPSON,
Deputy.

[Endorsed:] In the Supreme Court of the United States. R. H. Paul, appellant, *vs.* H. B. Cullom, appellee. Citation.

Erased in copy.

Service accepted this — day of August, 1886. Rec'd a copy of the within citation, reserving, however, all objections of every kind to the proceedings heretofore taken in reference to an appeal or other proceeding to review the case & to all acts on behalf of said Paul subsequent to the first decision of the supreme court of Arizona.

Aug. 18, 1886.

EARLL, CAMPBELL & STEPHENS,
Att'ys for said Cullum in Arizona Courts.

Supreme court Arizona Territory. R. H. Paul *vs.* H. B. Cullum. Filed Aug. 31st, 1886. E. B. Dodge, clerk, by Ed. H. Cook, deputy.

Endorsed on cover: Arizona Territory supreme court. No. 1056. R. H. Paul, appellant, *vs.* Henry B. Cullum. Filed October 2, 1886.

COPY OF THE OPINION.

[*From the 8th Pacific Reporter, p.* 187.]

SUPREME COURT OF ARIZONA.

CULLUM *vs.* PAUL.

Filed September 3, 1885.

1. Assignment for benefit of creditors—action by assignee to recover personal property.

An assignee for the benefit of creditors, after he has taken possession of the personal property conveyed to him by the deed of assignment, and has been wrongfully deprived thereof by a third party, can sue in his personal capacity to recover possession of the property.

2. Same—Assent of creditors presumed.

In the case of a general voluntary assignment, for the benefit of creditors, without preferences and without restrictions, in the absence of proof of dissent, the law presumes the assent of the creditors to the assignment for their benefit.

3. Appeal—Review of findings.

The findings of the court below will not be reviewed on appeal unless there was a motion for a new trial.

4. Same—Statement not purporting to contain all evidence—Verdict not sustained by evidence.

When the statement on appeal does not purport to contain all the evidence the appellate court will not consider an objection that the verdict, is not sustained by the evidence.

Appeal from the judgment of the district court, Pima County, in favor of plaintiff and respondent.

BENJ. MORGAN,
for appellant.

EARLL & CAMPBELL,
for respondent.

HOWARD, *C. J.*: This is an action brought by plaintiff to recover from the defendant the possession of certain goods, wares, and merchandise alleged to have been wrongfully taken by defendant from plaintiff, or for the sum of $35,000, the alleged value thereof, in case delivery cannot be had. The answer contains denials of the allegations of the complaint, and a further and separate answer and defense, alleging that defendant, as sheriff of Pima County, had seized and taken possession of the goods, &c., under an attachment issued from the district court of Pima County in the case of *G. Howard Thompson* vs. *Lord & Williams*, further alleging that goods, etc., were, at the time of seizure, in possession of and the property of Lord & Williams. The case was tried by the court without a jury.

The court found substantially that on the twenty-fifth day of October, 1881, the goods, etc., in question were the property of the firm of Lord & Wil-

liams, and C. E. Harlow, and that on that day said firm made a general assignment of all their property, not exempt from execution, to plaintiff, for the equal benefit of all their creditors, and plaintiff accepted said assignment and received said goods, etc., from said firm and took possession thereof, and that said assignment was made in good faith; that defendant as sheriff of Pima County, on the twenty-eighth day of October, 1881, seized, and took said goods, etc., (end of p. 187) (p. 188) from the possession of plaintiff under an attachment that day issued from the district court of Pima county in the case of *G. Howard Thompson* vs. *Lord & Williams*; that said property, when so seized and attached, was the property of plaintiff, and not subject to such seizure or attachment, and that the value thereof was $35,000.

The court found, as conclusions of law, substantially that the said goods, etc., were wrongfully taken and detained by the defendant from the possession of plaintiff, and that plaintiff was entitled to a judgment for the return of said property, and if the same cannot be made, for the sum of $35,000 against defendant. A judgment was entered upon their finding, in the following words:

> "The court having this day signed and filed its findings of fact and conclusions of law in this case, and the value of the property claimed having been found by the court to be the sum of thirty-nine thousand dollars, and the property claimed having been taken into possession of the plaintiff, therefore it is adjudged that the plaintiff have and retain possession of the personal property described in the complaint, with the costs," etc.

The case is brought up on appeal from the judgment alone. There was no statement on motion for a new trial. The record contains the judgment roll, a statement on appeal signed by attorneys for plaintiff and defendant, and defendant's specification of errors. The statement on appeal sets out evidence given at the trial without purporting to contain all the evidence given at the trial.

We will now proceed to notice defendant's specification of errors:

1. "The court erred in refusing to sustain the objection made by defendant to the introduction of the power of attorney offered by the plaintiff." There is nothing in the record showing this to have been error. The power of attorney was duly authenticated and was pertinent, and was part of plaintiff's evidence of title.

2. "The court erred in permitting the articles of agreement of the partnership between Lord & Williams Company to be read in evidence against defendant's objection." The record shows no error in this. The agreement was a part of plaintiff's evidence of title, and was duly proved.

3. "The court erred in admitting in evidence the assignment made by Lord & Williams Company to plaintiff Cullum against defendant's objection." The record shows no error in this. The assignment was a part of plaintiff's evidence of title, and was duly proved.

4. "The court erred in refusing to grant the motion made by defendant to strike out the testimony introduced by plaintiff in the case on the ground of variance between it and the allegations of the complaint.

5. "The court erred in refusing to pass upon and grant defendant's motion for a nonsuit, made on the conclusion of plaintiff's case, on the ground that the plaintiff had failed to make out his cause of action as alleged in his complaint." The record shows that these two specifications of error, as well as the first three, were based on an assumption (end of p. 188), (p. 189) by defendant, that because plaintiff in his complaint had sued simply in his individual capacity without showing his character as assignee, that therefore he should not be permitted to give in evidence the several instruments going to show title in him as assignee. The question raised is whether this assignee, after he had taken possession of the personal property conveyed to him by the deed of assignment, and has been wrongfully deprived thereof by a third party, can sue in his personal capacity to recover possession of the property, or whether he is bound to sue in his representative capacity.

The authorities leave no doubt on this question. It is expressly held in *Hogland* vs. *Trask*, 48 N. Y., 686, and *Ogden* vs. *Prentice*, 33 Barb., 160, that an assignee may sue either in his personal or representative capacity. It is a familiar rule that an executor or administrator, after he has reduced the goods of the estate to his possession, and has then been wrongfully deprived of them, may sue for the recovery thereof in his individual capacity. It is clear that the record shows no such errors as are claimed in fourth and fifth specifications of error.

6. "The defendant assigns, as further ground of error, the insufficiency of said findings to warrant or support the judgment in favor of plaintiff, on the ground that said findings show that the plaintiff, H.

B. Cullum, held said property by virtue of the assignment of Lord & Williams Company, and as trustee for the purpose of paying the creditors of said firm ; that at the time of the levying of the attachment in the case of *Thompson* vs. *Lord & Williams*, by the defendant herein, by virtue of which he took possession of said goods, etc., no creditor of said firm had assented to said assignment or become a party thereto in any way." It is a sufficient answer to this specification of error to say that the findings *nowhere show* that at the time of the levy of the attachment "no creditor of the firm had assented to said assignment, or become a party thereto in any way." We will add, however, that in the case of a general voluntary assignment for the benefit of creditors without preference, and without restrictions, as the record shows this to have been, in the absence of proof of dissent, the law presumes the assent of the creditors to the assignment for their benefit.

Grover vs. *Wakeman*, 1 Amer. Lead. Cas., 72;
Nicoll vs. *Mumford*, 4 Johns. Ch., 523, 529.

7. Also that there is no evidence that at the time of making of the said assignment there were any creditors of Lord & Williams Company, for whose benefit said assignment was made, and said Cullum claimed to hold said property. If this specification means that the findings show there was "no evidence," (and to entitle it to the consideration of this court it must mean that,) then a sufficient answer to it is that the findings show no such thing ; but, on the contrary, it is shown by the first finding that at the time of making the assignment the firm of Lord & Williams Company were insolvent, a condition that presupposes creditors.

8. (p. 190) The specification of errors then proceeds as folfows: "The defendant further shows the insufficiency of the evidence to justify the findings of fact and conclusions of law, upon the following grounds," and then elaborately sets out 15 distinct grounds. This specification and the grounds therefore cannot be considered by this court.

9. The record shows no statement on motion for new trial, and no motion for new trial. This is an attempt to review the findings of the court without a motion for a new trial. The findings of the court below will not be reviewed on appeal unless there was a motion for new trial. *Frederico* vs. *Hancock*, 1 Ariz. 512. In *Gagliardo* vs. *Hoberlin*, 18 Cal. 395, the defendant brought up all the evidence, but made no motion for a new trial. The Court say :

> "In this case, no motion having been made for new trial, the findings of the court are conclusive as to facts."

Mr. Justice Fields, in *Duff* vs. *Fisher*, 15 Cal. 380, says :

> "In this State the statute provides the manner in which the verdict of a jury, upon an issue submitted to its decision, may be reviewed. It is only by a motion for a new trial."

The statutes of California and Arizona are identical on this subject, and findings by the court stand on the same footing as the verdict of the jury. Though this doctrine is firmly established by an unbroken line of decisions in California construing a statute identical with our own, yet the whole doctrine is so ably and fully set forth by the Supreme Court of

California in *Reed* vs. *Bernal*, 40 Cal. 628, that we will quote at length from that decision. The court says ,page 630, *et seq.*:

> "When a party complains that the evidence was insufficient to justify a verdict or decision, the appropriate remedy is by motion for a new trial, and in pursuing this remedy the statute requires him to specify in his statement in support of the motion the particulars in which the evdence was insufficient. In this method the attention of the court and counsel is particularly directed to the precise point in which the evidence is alleged to be insufficient, so that on the trial of the motion the court may review the evidence and exercise its judgment and discretion, either by upholding or setting aside the verdict or decision. It is conceded on all sides that if there be any evidence whatever tending to support the verdict or decision, its sufficiency can only be determined, and the evidence reviewed for that purpose on a motion for new trial, and we have repeatedly held that if there be a substantial conflict in the evidence, this court will not disturb the verdict or findings. It is equally well settled that if there be no findings in a case tried by the court without a jury, and no proper exceptions for want of findings, a presumption arises that the court found all the facts necessary to support the judgment. If there be no actual findings, the law implies findings sufficient to sustain the judgment. In all cases, therefore, whether there be a verdict or written findings, or only the findings which the law implies in support of the judgment, if it be claimed that there was no evidence whatever to support the judgment, this is only another mode of saying that the evidence was insufficient to justify the verdict or findings, as the case may be. If the verdict or written findings support the judgment, it is too plain to admit of discus-

> sion that so long as the verdict or written findings remain undisturbed the judgment cannot be assailed on the ground that is not justified by the evidence. Before (p. 191) the judgment can be attacked on this ground, the verdict or findings must be set aside because not justified by the evidence, and this can only be done on motion for a new trial."

Such is the law of California and Arizona, and it is decisive of this case. The findings of the court in this case clearly warrant and support the judgment, and in the absence of a motion for a new trial, these findings are conclusive and binding upon this Court.

There is another serious obstacle in the way of defendant in his attack upon the findings of fact and conclusions of law. It is that the statement on appeal does not purport to contain all the evidence, and in examining the whole record it is evident that it does not. When the statement on appeal does not purport to contain all the evidence, the appellate court will not consider an objection that the verdict is not sustained by the evidence. *Moore* vs. *Tice*, 22 Cal., 514. It will be seen by the judgment copied into this opinion that in its recital it states that it was found by the court the value of the property was $39,000, whereas the findings show that the value was $35,000. This is evidently a clerical mistake in the party who draughted the judgment. The judgment shows that the property was in the possession of the plaintiff, and this error in the recital of the judgment can be of no possible damage to defendant. If anyone could be damaged by this error, it would be the plaintiff, as the judgment shows that he is in possession of the property, and he and his sureties are responsible for its value.

The judgment of the court below for $35,000, costs, etc., is affirmed.

PINNEY, *J.*, *Concurring.*

FITZERALD, *J.*, having presided at trial in court below, took no part in this case on appeal.

Supreme Court of the United States.

October Term, 1889.

R. H. PAUL
vs.
H. B. CULLUM.
No. 107.

Brief of W. Hallett Phillips and Ben. Morgan, for Appellant.

Cullum brought his action against Paul, Sheriff of Pima County, Arizona, to recover certain goods, or their value, alleged to have been the property of the plaintiff at the time of taking by the sheriff.

The defendant justified by virtue of a writ of attachment issued in the case of *Thompson* vs. *Lord & Williams*, under which he seized the goods as the property of Lord & Williams.

The plaintiff claims title by virtue of an assignment made to him for the benefit of creditors by the Lord & Williams *Company*, on October 25, 1881.

The attachment was levied, October 29, 1881.

The District Court of the First Judicial District of Arizona rendered judgment in favor of plaintiff, and, on appeal by the defendant, the same was af-

firmed by the Supreme Court of the Territory, from which judgment defendant appeals to this court.

As the assignment of error is predicated on the finding of facts made in the District Court, we give the latter in full.

Findings of Fact and Conclusions of Law.

(TITLE OF COURT AND CAUSE.)

In the above-entitled cause, after hearing counsel for the respective parties, and mature deliberation in the case, the court finds as follows:

I.

That on the 25th day of October, A. D. 1881, at the City of Tucson, Charles H. Lord, W. W. Williams, and C. E. Harlow, then, and for several months before that time composing the mercantile firm of Lord & Williams' Company, and exclusively engaged in general commercial business, viz., buying and selling goods, being insolvent, made and executed as such firm a general assignment of all their property not exempt from execution, for the equal benefit of all their creditors, to Henry B. Cullum, the plaintiff, and that the plaintiff immediately accepted said assignment and took possession of the property conveyed by it, including the property mentioned in the complaint, which property was a portion of the property of the said Lord & Williams' Company at the time of the assignment. The assignment was executed in the firm name by W. W. Williams, and also signed by said Williams and said Harlow individually, and by the said Lord by his attorney, the said C. E. Harlow, the said Harlow then holding a general power of attorney from him, and the said Lord being then absent from the Territory and sick, and his whereabouts being entirely unknown at that time to his partners and family, though every rea-

sonable effort had been made to discover it, and that said assignment was ratified and approved by said Lord at the earliest opportunity.

II.

That on the said 25th day of October, A. D. 1881, and for a long time previous thereto, at said city, the said Charles H. Lord, and W. W. Williams were co-partners in the banking business and in dealing in live stock, under the firm name of Lord & Williams; that on said last mentioned day the said firm of Lord & Williams, being then insolvent, made and executed a general assignment of all its property not exempt from execution for the general benefit of all its creditors to the said Henry B. Cullum, who thereupon immediately entered upon the possession of the same and accepted the trust. Said assignment was executed in the firm name by said Williams, and also signed by him, individually, and by said Harlow, as Lord's attorney-in-fact.

III.

That said assignments were made in good faith by the said firm respectively, and that at the time of making the same the assignors had full confidence in the ability and integrity of said Henry B. Cullum.

IV.

That on the 28th day of October, A. D., 1881, one G. Howard Thompson commenced a suit in this court against the said Lord & Williams, and sued out an attachment therein against the property of the said Lord & Williams, and placed the same in the hands of the defendant, Robert H. Paul, who was then the sheriff of Pima County aforesaid; and the said Paul, claiming that the said goods and property in the complaint mentioned and described were then the property of the said Lord & Williams, and not the

property of the plaintiff, seized and attached the same against the will of the plaintiff, on the 29th day of October, A. D. 1881.

V.

That at the time the said property was so seized and attached it was the property of the plaintiff, and not subject to such seizure or attachment.

VI.

That the value of the property in question is thirty-five thousand dollars.

And as conclusions of law from the foregoing facts the Court finds—

I.

That the property in the complaint mentioned and described was wrongfully taken and detained by the defendant from the possession of the plaintiff.

II.

That the plaintiff is entitled to a judgment for the return of said property, and if the same cannot be made for the sum of $35,000 against the defendant.

And it is ordered that judgment be so entered.

Dated Tucson, October 9th, 1884.

(Signed) W. F. FITZGERALD.

Associate Justice of the Supreme Court of Arizona, and presiding Judge of the District Court, First Judicial District, Pima. County, A. T.

R., 2–7.

The judgment entered on this finding was "That the value of the property claimed having been found

to be the sum of thirty-nine thousand dollars, therefore it is adjudged that the plaintiff have and retain possession of the personal property described in the complaint, together with the costs of this action, amounting to the sum of five hundred and thirty-nine dollars." R., 6.

The statement on appeal, which, under the law of the Territory takes the place of a bill of exceptions, contains the assignment of error, relied on to show that the judgment appealed from was erroneous. It also contains all the evidence in the case, in order to show that there was no competent evidence to support the ultimate facts found by the Court, upon which the determination of the case depended.

The Territorial Supreme Court, by affirming the judgment and making no finding of their own, adopted the finding appealed from, and overruled the exceptions to the same.

The defects in the finding, which are relied on as error, were presented to that court, as the territorial procedure prescribed, and being fully informed as to the nature of the complaint they refused to correct the error.

This Court is now called upon as a matter of law, to review the judgment based on the findings.

Kerr vs. *Clampitt*, 95 U. S., 190;
Stringfellow vs. *Cain*, 99 U. S., 618;
Hargrave vs. *Head*, 105 U. S., 46.

It is a well settled rule that where a court finds a material fact which is not supported by any evidence, a bill of exceptions may be taken to bring up for review the ruling in that particular, and if necessary the whole of the testimony should be sent up.

The Francis Wright, 105 U. S., 390;
U. S. vs. *Pugh*, 99 U. S., 270.

This rule is subject to the limitation that the facts are material and ultimate facts.

When all the evidence is properly presented in the record, this Court can examine the same to see whether it was competent evidence to establish the facts found.

U. S. vs. *Clark*, 96 U. S., 39.

The sole issue in the case is whether the property in question, at the time of the attachment, belonged to the plaintiff or belonged to Lord & Williams. If the plaintiffs established ownership, the goods were not subject to attachment by the creditors of Lord & Williams, and the plaintiff must recover.

Assignment of Error.

The Court find the issue of title in favor of the plaintiff, by virtue of an assignment alleged to have been made to plaintiff prior to the attachment by the Lord & Williams *Company*.

They find that the goods were, at the date of the assignment, the property of the Lord & Williams *Company*.

That at the same date as the assignment by the Lord & Williams *Company*, prior to the attachment, an assignment was made by Lord & Williams of all their property to the plaintiff. These findings, which led to the judgment, we say are unsupported by any competent evidence, so that the conclusions of law have no foundation to rest on.

The second finding is, that the firm of Lord & Williams, on October 25, 1881, made an assignment to plaintiff.

This finding is entirely unsupported by any evidence. No such assignment, as shown by the record, was ever made. The only assignment was that by the Lord & Williams *Company*, a different firm, and, as indicated in the first finding, was made on *October* 25, 1881, and is undoubtedly the one referred to by the court in the second finding. It is through this assignment of the Lord & Williams *Company* that the plaintiff claims title. Whether the Lord and Williams *Company* had any title themselves depends upon the construction of the agreement between Lord & Williams and C. E. Harlow, by which the Lord & Williams *Company* was organized, which agreement was admitted in evidence against the objection of the defendant. It is as follows:

TUCSON, A. T., *March* 1, 1881.

This agreement entered into—and between Lord and Williams and C. E. Harlow, all of Tucson, Arizona Territory, witnesseth: That the said Lord & Williams have this day and date taken into partnership the said C. E. Harlow, under the following conditions: They agree that an inventory of their stock of merchandise shall be taken under the supervision of said Harlow, and after its value shall be agreed upon by the parties interested the same shall be turned over and delivered to the said Harlow as a capital stock to be sold with his entire direction and supervision under the name and style of Lord and Williams Company for the term of one year from the date of this agreement. The said Harlow shall attend to all the business of the new concern, such as the payment of debts, employment of help, purchase of goods, payment of same, and all expenses attend-

ing the proper and legitimate carrying on of the business ; shall open a new set of books, in which a complete and true exhibit of the business shall be kept, and always open to the parties interested for inspection; shall as far as possible do a cash business; shall remit money to pay debts incurred as fast as the same may be realized from sales; shall not sign, endorse or negotiate any notes, bonds, or agreements using the new firm name unless strictly in connection with the business of the house, and then only after consultation with one or both the other members of the firm; shall cause, at the end of each month, an exhibit to be made of the condition of the firm in the shape of a balance-sheet; and finally, every six months shall cause an inventory to be taken of all the property and the books balanced, after which any profit there may be shall be divided as follows: The said Lord & Williams shall have eight-tenths of the same, and the said Harlow two-tenths of the same. In case of loss, the same ratio shall prevail in sharing the same. In this contract it is distinctly understood by the parties interested, that the partnership only pertains to that of merchandising, and has no connection in any case or manner with any business the said Lord & Williams may have jointly or severally outside. Any trade or business they may be able to direct to the new concern they shall do so, any profits to be derived from same to be considered identical with those arising from business with other parties. They, however, shall have at cost price any merchandise they may need or require for their individual account. In case said Harlow shall add any cash to the capital stock, he shall receive for same ten per cent. interest per year, which amount shall be charged to the general exchange and interest account.

(Signed) C. H. Lord,
W. W. Williams,
C. E. Harlow.

R. pp. 11–12.

At the date of this agreement, the firm of Lord & Williams were engaged in a general commercial business—the buying and selling of goods, and the goods in controversy were part of their stock. They had become indebted to the Bank of California on checks and drafts in an amount exceeding $17,000. These the bank transferred to G. H. Thompson, and it was at his instance that the defendant, as sheriff, levied the attachments on the goods which were then in a store occupied by the firm of Lord & Williams.

The question for decision is whether the firm of Lord & Williams divested themselves of ownership of the goods by the arrangement contained in the agreement of March 1, 1881.

What was intended by the arrangement?

It is to be noticed that the firm of Lord & Williams did not pass out of existence by reason of the agreement; on the contrary, its continued existence is recognized by it.

All of the testimony shows that it continued to do business in the same building as formerly, only that its transactions were confined to financial matters. R. p. 27.

It is apparent that the agreement was only an arrangement for selling the goods.

By its terms "the said Lord & Williams have this day taken into partnership the said C. E. Harlow under the following conditions: They agree that an inventory of their stock of merchandise shall be taken under the supervision of said Harlow, and after its value shall be agreed upon by the parties interested *the same shall be turned over and delivered*

to the said Harlow as a capital stock, to be sold with his entire direction and supervision under the name and style of the Lord & Williams Company for the term of one year from the date of this agreement."

It is submitted that this agreement did not work such a devolution of the *title* to the goods, as to exempt them after its execution, from attachment as the goods of Lord & Williams.

It was error in the Court below to admit in evidence, over defendant's objection, this agreement and the subsequent assignment of the Lord & Williams *Company*, as evidence of title in the plaintiff; the agreement instead of being evidence of title in the plaintiff shows that no such title passed. Notwithstanding the agreement, Lord & Williams still continued to own the merchandise.

The plaintiff below treated the agreement as *a sale* by Lord & Williams. Thus Mr. Williams, on behalf of plaintiff, testifies: "The understanding was that we would form this partnership and take in Mr. Harlow, and *sell him the goods.*" (p. 45.)

But when he is asked what interest in the goods Harlow purchased, he answers:

"As I understand it, he did not purchase any interest in the goods. The goods were *sold to Lord & Williams' Company*, and at the end of the year of course he was to share *certain profits, if there were any profits*, and certain of the losses, if there were any losses.

Q. "Then C. E. Harlow paid not a dollar in the purchase of those goods from Lord & Williams?

A. "No, sir." (p. 47.)

The books of Lord & Williams' Company show this entry:

"*Merchandise* debtor to Lord & Williams, stock account ..... $69,000."
(p. 47.

The Court will construe the agreement, in order to arrive at the true nature of the transaction, and the form of it cannot hide the fact that, as between the parties, it was not really a sale of the goods, but the mere placing them in the hands of Harlow to be managed and disposed of by him under the name of the Lord & Williams' *Company*, for the benefit of Lord & Williams.

It was an arrangement by the owners to put the goods on the market, with an agreement to pay the managing agent a certain per cent. of the profits.

The only interest of Harlow was in any profits that might have resulted. Though termed a partnership, the real contract as between the parties was one of employment.

But whether Harlow was liable as a partner or not is not a controlling question. Admitting that he was so liable, it does not follow that he acquired any interest in the stock so as to exempt it from attachment for debts contracted by Lord & Williams before his connection with the business.

No such interest follows from the fact that he was to share profits and losses; it is not pretended there were any profits to share and the business was terminated by the assignment.

Blanchard vs. *Cooledge*, 22 Pick., 23.

All that Harlow acquired was a personal right of action against Lord & Williams, or a right to an account; the arrangement did not change the property.

Jessel, M. R.
Alfaro vs. *De La Torre*, 24 Weekly Rep., 510.

We repeat that the question is not whether a participation in profit and loss should cause Harlow to be considered as a partner and answerable as a member of the Lord & Williams Company to third persons. There is no question here as to holding out Harlow as a partner.

The inquiry is as to what was accomplished by the contracting parties as between themselves, and whether there was any change in the title to the stock. The intention of the parties as expressed in the agreement is to control; whether the agreement constituted a partnership in the stock is one of construction, and therefore one of law.

Kinsbury vs. *Tharp*, 28 N. W. R., 74 (Mich).

Sharing profit and loss is not proof of partnership in stock.

Donnell vs. *Harshe*, 67 Mo., 170;
Clifton vs. *Howard*, 89 Mo., 192.

It cannot be doubted that the parties in a mercantile partnership may so stipulate as between themselves that the ownership of the stock shall remain with the original proprietors, and that one of the associates shall only have an interest in the profits. Such stipulations are not infrequent in associations like the one with which we are now deal-

ing, where two of the parties possess all the stock, the other only gives his services, and where the business is of a limited character, both as respects the subject matter and the duration of the association.

Each case must be judged on its own facts in order to determine the character of the particular contract.

In the case under consideration, we submit that it is plain on the face of the contract that Lord & Williams retained the ownership of the goods at the time of the assignment and attachment.

A good illustration of this is afforded by the case of *Drennan* vs. *London Assurance Company*, twice decided by this Court.

The question in the first case was, whether an agreement between the members of a then existing firm and one Arndt, by which, in consideration of his payment of a sum of money, he was to be admitted into an association to be thereafter organized by the parties, made him a member of the partnership already existing, and a co-owner of its property. Upon the determination of that question depended the right of the plaintiffs (the original members of the partnership) to recover from the company for a loss of goods of the partnership.

A clause of the policy made it void, if any change should take place in the title or possession.

The Court say, that the inquiry was restricted to the ascertainment of the intention of the parties as disclosed by the agreement, and their conclusion was, that there was no change affected in the title to the property,—the agreement looking merely to the future

association, and until then, no interest in the new associate accrued.

Drennan vs. *London* Assurance Co., 113 U. S., 51.

On a new trial, there was evidence that, after a cash payment and the execution of a note on account of the interest to be acquired in the future association, by an agreement with the firm, Arndt became entitled to participate in the profits of the then existing firm, and was spoken of as a member of the firm.

The dispute was whether this arrangement gave him an interest in the stock.

The question, say the Court, is not whether Arndt, by reason of his participation in the profits of the business, could not have been charged, at the suit of creditors, as a partner in the existing firm.

The inquiry was whether there occurred before the execution of the policies any change of title or possession *of the stock*.

They thus dispose of the point:

"The sale or transfer to which the polices refer was one that would pass an interest in the property itself. Mere participation in profits would give no such interest contrary to the real intention of the parties. Persons cannot be made to assume the relations of partners, as between themselves, when their purpose is that no partnership shall exist. *There* is *no reason* why *they may not enter into an arrangement or agreement whereby one of them shall participate in the profits arising from the management of particular property without his becoming a partner with the others, or without his acquiring an interest in the property itself so as to effect a change of title.*"

The Court held there was no change in the title to the property of the original partners by virtue of their agreement to share the profits with Arndt.

There was, accordingly, judgment for the plaintiffs.

London Assurance Co. vs. *Drennan*, 116 U. S., 461.

The assignment made by the Lord & Williams *Company* to the plaintiff, could not support the right of action, if we are right in the views we have advanced. The assignee got no better title than that possessed by the Lord & Williams *Company*. The assignment passed the property of the Lord & Williams *Company* only, and the property in question as we claim, continued to be the property of Lord & Williams, notwithstanding the agreement of March 1, 1881, and the assignment by the Lord & Williams *Company*. It was error in the court below to have admitted this assignment in evidence as proof of title in plaintiff.

It was urged, in the specification of error in the Supreme Court of the Territory, as a further objection to the assignment, that it showed on its face it was not signed by C. H. Lord, one of the members of the Lord & Williams *Company*, and that the power of attorney to C. E. Harlow, the admission in evidence of which was also objected to, conferred no authority on him to sign the name of Lord to the assignment; it was simply a general power of attorney, authorizing Harlow to attend to the personal affairs of Lord, in his absence.

It does not purport to empower Harlow to perform any partnership act for Lord, much less such an act

as the assignment in question*. For this a special authorization was necessary.

Wooldridge v. *Irving*, 23 Fed. Rep., 31.
Hook v. *Stone*, 34 Mo., 329.

If Harlow possessed no authority, by virtue of the power of attorney, to sign Lord's name to the assignment, the latter is void for want of the assent of one of the partners. All the partners must unite in such a disposition of the partnership property.

The New York Court of Appeals, in *Wells* vs. *March*, thus recently announce the rule:

"The authority of each of several partners, as agent of the firm, is necessarily limited to transactions within the scope and object of the partnership, and in the course of its trade or affairs. A general

* POWER OF ATTORNEY.

"Know all men by these presents that I, Charles H. Lord, of the county of Pima, Territory of Arizona, have made, constituted, and appointed, and by these presents do make constitute, and appoint, C. E. Harlow, of the county and Territory aforesaid, my true and lawful attorney for me and in my name, place, and stead, and for my use and benefit, to ask, demand, sue for, recover, collect, and receive all such sums of money, debts, dues, accounts, legacies, bequests, interests, dividends, annuities, and demands whatsoever, as are now, or shall hereafter become due, owing, payable, or belonging to me, and have use and take all lawful ways and means in my name or otherwise, for the recovery thereof by attachments arrests, distress, or otherwise, and to compromise and agree for the same, and acquittance or other sufficient discharges for the same, for me, and in my name to make, seal, and deliver; to bargain, contract, agree for, purchase, receive, and take lands, tenements, hereditaments, and accept the seizure and possession of all lands, and all deeds, and other assurances in the law therefore, and to let, lease, bargain, demise, sell, remise, release, convey, mortgage, and hypothecate lands, tenements, and hereditaments upon such terms and conditions, and under such covenants as he shall think fit. Also to bargain and agree for,

assignment to a trustee of all the funds and effects of the partnership for the benefit of creditors is the exercise of a power without the scope of the partnership enterprise, and amounts of itself to a suspension or dissolution of the partnership itself. It is no part of the ordinary business of the co-partnership, but outside and submersive of it. No such authority as that can be implied from the partnership relation."

Wells vs. *March*, 30 N. Y., 344.

In that case, one of the partners had absconded, and the general assignment was made by the other partners. The court held the assignment void.

The decision was affirmed in *Palmer* vs. *Myers*, 43 Barb., 511.

A very full and critical consideration of all the

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buy, sell, mortgage, hypothecate, and in any and every way and manner deal in and with goods, wares, and merchandise, choses in action, and other property in possession, or in action, and to make, do, and transact all and every kind of business of what nature and kind soever, and also for me and in my name, and as my act and deed, to sign, seal, execute, deliver, and acknowledge such deeds, covenants, indentures, agreements, mortgages, hypothecations, charter parties, bills of lading, bills, bonds, notes, receipts, evidences of debt, releases, and satisfactions of mortgage, judgments and other debts and such other instruments in writing of whatever kind and nature, as may be necessary or proper in the premises.

Giving and granting under my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes, as I might or could do if personally present, hereby ratifying and confirming all that my said attorney shall lawfully do or cause to be done, by virtue of these presents.

In witness whereof, I have hereunto set my hand and seal the Sixth day of April, one thousand eight hundred and eighty one.

(Signed.) CHARLES H. LORD."

R. 10.

authorities to date is to be found in Burrill on Assignments, 5th Ed. (1887), 126, 127.

One of the propositions which he thinks deducible from the cases and sustained by the weight of authority is as follows:

"One partner cannot make a general assignment of the partnership effects to a trustee for the benefit of creditors even ratably, without the consent or against the known wishes of the other partners, for the reason that no such authority can be implied from the partnership relation."

He also lays it down that the mere absence of a partner from the country will not be regarded as conferring such a power upon the remaining partner.

While it is true that the partner who did not join in the assignment may ratify it, such ratification cannot relate back so as to invalidate intervening attachments.

Holland vs. *Drake*, 29 Ohio St., 455;
Stein vs. *La Dow*, 13 Minn., 412.

It was on this ground that defendant objected to the introduction of any evidence, showing an attempted ratification of the assignment by Lord, the non-concurring partner. R., 12.

We will not pursue the point further. It has been elaborately argued before this Court at the present term in the case of *Union National Bank* vs. *Bank of Kansas City*, not yet decided.

We submit that the judgment should be reversed.

W. HALLETT PHILLIPS,
BEN. MORGAN,
for Appellant.

Supreme Court U.S.
FILED
NOV 12 1889
JAMES H. MCKENNEY
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 107.

R. H. PAUL,

Appellant,

vs.

HENRY B. CULLUM,

Appellee.

BRIEF AND POINTS FOR APPELLEE.

LUCIEN BIRDSEYE,

Attorney and of Counsel for Appellee,

No. 170 Broadway,

New York City.

Supreme Court of the United States.

OCTOBER TERM, 1889. NO. 107.

R. H. PAUL,
Appellant,

vs.

HENRY B. CULLUM,
Appellee.

Brief and Points for Appellee.

[The references are to the original pages of the Record.]

This case comes before this Court on appeal from the Supreme Court of the Territory of Arizona, affirming a judgment recovered in the District Court, by Cullum, as plaintiff, against Paul as defendant.

First.

The following is a concise abstract or statement of the case, presenting succinctly the questions involved, and the manner in which they are raised.

I.

The action was brought by Henry B. Cullum, as plaintiff, against R. H. Paul, as defendant, on November 8,

1881, in the District Court of the First Judicial District in and for the County of Pima, Territory of Arizona, (pp. 2-4). The action was to recover certain goods, of the value of $35,000, wrongfully taken by defendant on Oct. 28th, 1881, from the possession of plaintiff, and which defendant, after demand, wrongfully withheld. Plaintiff demanded judgment for possession of the goods, or for $35,000, the value thereof, in case delivery could not be had, pp. 2-4.

After demurrer and answer, pp. 6-7, defendant, by an amended answer, denied plaintiff's ownership of the goods and their value, and the wrongful taking, demand and unlawful detention; and justified the taking by virtue of a writ of attachment issued to defendant as Sheriff of said County of Pima, in a suit brought by one Thompson against Lord & Williams, to whom the property mentioned in the complaint is alleged to have belonged; pp. 8-9.

The goods were replevied and delivered to plaintiff, Cullum, at the commencement of the suit; p. 12, Finding IV. The judgment recited, p. 14, that the property claimed had been taken into the possession of plaintiff, and adjudged that plaintiff have and retain possession of the property, with $539. costs of the action: the judgment being entered Oct. 11, 1884.

II.

It appears by the "Statement on Appeal and Amendments and Additions Proposed by Plaintiff and Accepted by Defendant", P. 14, that the cause was tried before "the District Court of said County of Pima, the Honorable W. F. Fitzgerald, associate Justice of the Supreme Court of the Territory of Arizona, presiding, sitting without a jury, a jury having been expressly waived.", p. 14-5.

Plaintiff introduced certain testimony, pp. 15–70, and rested.

Thereupon, defendant's Counsel made a motion to strike out the entire testimony, on the ground of variance between the allegations of the complaint and the testimony; and also moved for a non-suit; p. 70.

Both motions were denied after argument.

Defendant then, pp. 71–90, put in evidence the papers in the suit of Thompson *vs.* Lord & Williams: being the affidavit for the attachment, pp. 72–3; the first undertaking on the attachment, pp. 74–5; the second undertaking, pp. 76–8; the writ of attachment, pp. 79–80; and the judgment roll, pp. 81–90.

No proof whatever appears to have been given in support of the allegation of the Amended Answer, p. 9, that the goods sued for herein belonged to or were in the possession of Lord & Williams, when seized by the Sheriff under the Thompson Attachment.

Certain testimony on the part of plaintiff in rebuttal appears at pp. 90–100.

After the arguments of Counsel, and on Oct. 9, 1884, Judge Fitzgerald signed the Findings of Fact and Conclusions of Law which appear in the judgment roll, pp. 10–13; deciding the issues in favor of plaintiff, and finding that the property in question when seized and attached was the property of the plaintiff, and not subject to seizure or attachment, and that its value was $35,000, p. 12; that the property was wrongfully taken by defendant; and that plaintiff was entitled to a judgment for its return, or if return could not be made for the sum of $35,000 against defendant, p. 13. On Oct. 11, 1884, judgment was rendered. It recited the signing and filing of the Court's findings of fact and conclusions of law, and that the value of the property claimed had been found by the Court to be $39,000, and that the property claimed had been taken into the possession of the plaintiff. It then adjudged that plaintiff

retain possession of the property, with the costs of the action, $539., p. 14.

III.

There was no motion on the part of defendant for a new trial on any ground whatever.

IV.

On Oct. 31st, 1884, defendant appealed from such judgment to the Supreme Court of the Territory, pp. 108–9.

The errors and grounds on which appellant relied upon said appeal appear in the Assignment of Errors, &c., pp. 101–8.

V.

Thereupon defendant prepared a "Statement" on the appeal. Plaintiff proposed certain amendments and additions thereto, which were accepted by defendant; and such "Statement on Appeal" is set forth at pp. 14–108: at which latter page is found the stipulation of both parties, "that the foregoing statement on appeal is agreed to by the undersigned Counsel for the respective parties, and that the same may be used on appeal from the judgment herein:" This "Statement" being thus prepared and settled pursuant to Sec. 340 of Chap. 48 (treating "of Proceedings in Civil Cases") of the Compiled Laws of Arizona. See Compiled Laws of Arizona by Bashford, 1871; same by Hoyt, 1877, p. 461.

VI.

On March 3, 1885, the judgment appealed from was affirmed by the Supreme Court of the Territory; p. 115.

The opinion given on such affirmance is published in 8 Pacific Reporter, p. 187.

On June 5 1885, an appeal was allowed to the Supreme Court of the United States ; p. 117.

The return to that appeal was filed with the Clerk of the Supreme Court of the United States on July 24, 1885, p. 125, and the case became Number 893 of the October Term, 1885.

VII.

On March 1st, 1886, on motion of Counsel for the appellant, such appeal was dismissed with costs without prejudice to the right of appellant to pray another appeal, (See copy decree of March 1, 1886.)

VIII.

Thereupon, a motion for a re-hearing was made in the Supreme Court of the Territory ; which on July 9, 1886, was denied by the Supreme Court of Arizona, and an appeal was allowed from that Court to the Supreme Court of the United States, p. 57 ; which appeal is the one now under examination.

IX.

The facts out of which this litigation arose, and the questions litigated in the Courts below, were as follows :

Prior to March 1st, 1881, Charles H. Lord and W. W. Williams had been partners in business at Tucson, Arizona, under the firm name and style of Lord & Williams. They had been general merchants, and had also carried on the business of banking and government contracts, and had dealt in live stock, &c., pp. 11 : 58 : 95 : 97.

Dr. Lord, p. 97, thought there was more money in out-

side matters. He had bought the water franchise, or intended to buy it, and the street railroad, and other matters. Williams wanted to go east, having been in Tucson nearly seven years, with the exception of two months. Thereupon an understanding was arrived at, to form a new partnership; take in Mr. C. E. Harlow; turn over to the new firm the goods of the old concern; and commit the management of that business to him, Harlow. Williams was to go East the 1st of May to spend the summer; that having been promised him for several years. Dr. Lord was to return and attend to the business and other outside matters, and these contracts. He wanted more time to attend to the contracts, as he was satisfied there was more money in those than in the mercantile business.

Thereupon, the agreement of March 1st, 1881, was entered into between Lord, Williams and Harlow, which appears in the Record, p. 25–7.

It was signed individually by Lord, Williams and Harlow.

By this agreement, Lord & Williams on that day and date took Harlow into partnership under the following conditions: An inventory of their stock of merchandise was to be taken under the supervision of Harlow, and after its value should be agreed upon by the parties interested it was to be turned over and delivered to Harlow as a capital stock, to be sold with his entire direction and supervision, under the name and style of "Lord & Williams Company," for the term of one year from that date. Harlow was "to attend to all the business of the *new concern*," such as the payment of debts, employment of help, purchase of goods, payment of same, and all expenses attending the proper and legitimate carrying on of the business; was to open a new set of books, in which a complete and true exhibit of the business was to be kept, and always open to the parties interested for inspection: as far as possible, was to do a

cash business: was to remit money to pay debts incurred as fast as the same might be realized from sales: was not to sign, endorse or negotiate any notes, bonds or agreements "using *the new firm name* unless strictly in connection with the business of the house, and only then after consultation with one or both the other members of the firm": was to cause a monthly exhibit to be made of the condition of the firm in the shape of a balance sheet: was to cause an inventory to be taken every six months of all the property and the books to be balanced. After that, any profit there might be was to be divided to Lord and Williams, eight tenths, and to Harlow, two tenths of the same: the losses to be shared in the same ratio. The agreement proceeded thus: "In this contract it is distinctly understood by the parties interested that the partnership only pertains to that of merchandising, and has no connection in any shape or manner with any business the said Lord & Williams may have jointly or severally outside." They were to direct to the new concern all the business they were able to do, the profits to be derived therefrom to be considered identical with those arising from business with other parties. They might, however, have at cost price any merchandise they might need or require for their own individual account. In case Harlow should add any cash to the capital stock, he was to receive for the same ten per cent interest per year, chargeable to the general exchange and interest account.

Mr. Williams testified, p. 98, that there was two weeks discussion before those partnership papers could be agreed to. That, p. 95, Harlow had the management of the business of the Lord & Williams Company from its conception to the assignment; and see p. 59 & p. 57; and that he had nothing to do with what defendant's counsel, at p. 98, called "the firm of Lord & Williams," except, "In some questions which might arise where he might act for the Doctor, (Lord), as his power of attor-

ney." And the entire testimony of Cullum and Sessions shows that the business of the Lord & Williams Company in purchasing and selling goods was carried on in a different place of business from that of Lord & Williams; such latter business being carried on by Mr. Cullum on behalf of Lord & Williams as a banking business, and in connection with agency contracts, &c. &c. New and separate signs of the "Lord & Williams Company" were put up, advertisements of the business of Lord & Williams were published; one of which appears at pp. 62–4. And see the question by the Court, p. 58: "Were these different businesses conducted in different stores or places, or were they all in the same building?"

On April 6, 1881, Dr. Lord had given to Harlow the power of attorney set forth at pp. 22–4.

From March 1, 1881, to Oct. 25, 1881, Lord & Williams carried on their business under that name, of banking, Indian agency contracts, &c. &c.: in which, as appears from all the proofs, Harlow took no part whatever, excepting when he acted under the express authority given him by Dr. Lord's letter of attorney of April 6, 1881, above referred to. During the same period, the Lord & Williams Company was carried on separately and independently, under the sole management of Harlow, according to the terms of the partnership agreement. Neither Williams nor Lord took any part therein. That concern kept an account as depositors and dealers with the firm of Lord & Williams, as bankers. They contracted numerous debts, in that firm name, and under that style. Lord & Williams contracted like obligations under their firm name of Lord & Williams. Under that name, as appears by the complaint in Thompson *vs.* Lord & Williams, p. 82–3, they, between Jan. 1 and October 25, 1881, drew checks and drafts on the Bank of California, payable to the order

of divers persons, and negotiated them, the Bank of California as drawee paying the same.

On Oct. 25, 1881, a general assignment was executed by the Lord & Williams Company, which, p. 10, was then insolvent, of its stock in trade to the plaintiff Cullum, under which he claimed the goods in question in this action. The assignment appears at pp. 30-33. It was signed in the firm name of Lord & Williams Company by Harlow. It was signed by Williams and Harlow individually, and by C. H. Lord by Harlow as his Attorney in fact, under the letter of attorney of April 6, 1881, above referred to; Dr. Lord being at that time absent, having gone east ill, and being subsequently found in a hospital in St. Louis, p. 16-7: 27. It devoted all the assets of the firm of Lord & Williams Company to the payment of all the debts due or to become due from the assignors, without preference or priority.

Another general assignment was executed on Oct. 25, 1881, by Lord & Williams, who p. 11, were then insolvent, to Mr. Cullum, of all their assets, that paper being executed in like manner and under similar trusts. See 2d Finding of Fact, p. 11.

The assignment of the Lord & Williams Company was recorded on the day of its date at 5:15 P. M., p. 35. Immediately on the acceptance and recording of the assignment, Cullum entered into the possession of the assigned property, p. 35. He was in possession thereof, when, on Oct. 28th, 1881, G. H. Thompson, as the assignee of the Bank of California, and of Zeckendorf & Co. brought suit, and took the proceedings pleaded and put in evidence as justification, pp. 8-9; 72-90.

Under that attachment, the Sheriff seized the merchandise in question in this action. The same was taken back by plaintiff under security, the sureties in that redelivery bond being the house of Horace B. Claflin & Co. of New York City; one of whose members, Mr.

Dunn, was in Tucson at the time of the failure, and whose connection with the attempt to lift the assignment and continue the business of both Lord & Williams and the Lord & Williams Company, is referred to in the testimony of Mr. Williams, p. 90, &c.; and where the "attempt of these parties to assist" the firm or firms is spoken of (that matter having evidently been gone into at length in defendant's case, though the testimony is not here set out in this Record). So, Mr. Dunn is again mentioned at p. 92, on the direct, and at p. 96 on the cross-examination.

X.

The questions litigated upon the trial before Judge Fitzgerald were evidently substantially these:

1. Whether there was any such firm as that of the Lord & Williams Company, actually and in good faith formed and entered into and conducted and carried on prior to the assignments of Oct. 25, 1881.

2. Whether there was a sufficient execution of the assignment of the Lord & Williams Company, because of the absence of the execution thereof by C. H. Lord in person, and because it was executed by him only by his attorney in fact.

3. Whether such assignment was made and executed and accepted in good faith by the respective parties thereto.

4. Whether the assignee took immediate and actual possession of the assigned property, and was in possession thereof at the time of the issuing of the Thompson attachment.

5. Whether Mr. Cullum, the assignee, could maintain this action in his individual capacity, having taken the assignment as assignee and trustee for the benefit of creditors.

XI.

After hearing the evidence and the arguments of counsel, Judge Fitzgerald found as facts, p. 10–13, as follows :

1. That on Oct. 25, 1881, Lord, Williams and Harlow, then and for several months before that time composing the mercantile firm of Lord & Williams Company, and exclusively engaged in general commercial business, viz., buying and selling goods, being insolvent, made and executed as such firm a general assignment of all their property not exempt from execution, for the equal benefit of all their creditors to Cullum, plaintiff ; that he immediately accepted the assignment and took possession of the property conveyed by it, including the property mentioned in the complaint, which property was a portion of the property of the Lord & Williams Company at the time of the assignment : that the assignment was executed in the firm name by Williams : was also signed by Williams and Harlow, individually, and by Lord by his attorney Harlow, who then held a general power of attorney from him ; said Lord being then absent from the Territory and sick, and his whereabouts being then entirely unknown to his partners and family, though every reasonable effort had been made to discover it : and said assignment was ratified and approved by Lord at the earliest opportunity.

2. That on said 25th October, 1881, and for a long time previous, Lord & Williams were copartners in the banking business, and in dealing in live stock, under the firm name of Lord & Williams ; and that on that day that firm, being insolvent, made and executed a general assignment of all its property not exempt from execution for the equal benefit of all its creditors to Cullum, who thereupon immediately entered upon the possession of the same, and accepted the trust. Said assignment was executed in the firm name by Williams and signed

by him individually and by Harlow as Lord's attorney in fact.

3. That said assignments were made in good faith by said firms respectively ; and that at the time of making the same the assignors had full confidence in the ability and integrity of Cullum.

4. That on Oct. 28, 1881, G. H. Thompson commenced a suit in the same Court against said Lord & Williams ; sued out an attachment against the property of Lord & Williams : placed it in the hands of defendant Paul, then Sheriff of Pima County: and Paul, claiming that the goods in the compiaint mentioned were then the property of Lord & Williams, and not the property of Cullum, the plaintiff, seized and attached the same on Oct. 28, 1881, and held the same until replevied in this suit.

5. That at the time the property was so seized and attached it was the property of the plaintiff and not subject to such seizure or attachment.

6. That its value was $35,000.

As conclusions of law the Judge held.

1. That the property in question was wrongfully taken and detained by defendant from the possession of plaintiff.

2. That plaintiff was entitled to a judgment for its return ; and if return could not be made for $35,000 against defendant.

Judgment followed accordingly, p. 14, except for the evident clerical error in stating the value to have been found at $39,000, when it was found at $35,000.

XII.

Upon the appeal defendant and appellant assigned the

errors and grounds upon which he would rely upon appeal, as the same appear at pp. 101-107.

The first four of these were alleged errors in relation to the testimony admitted under exception, and the refusal to strike out the testimony on the grounds of variance.

The fifth alleged error in the refusal to non-suit plaintiff, at the conclusion of his case.

The sixth alleged as error the insufficiency of the findings of fact to warrant or support the judgment, on the ground that as plaintiff held the goods by virtue of the assignment of Lord & Williams Company, and as trustee for the purpose of paying their creditors, no creditor of that firm had assented to the assignment or become party to it in any way, when defendant levied the attachment against Lord & Williams, by which he took the goods in question.

The seventh was that there was no evidence that at the time of the making of the assignment there were any creditors of the Lord & Williams Company.

Errors are then assigned, p. 103-6, to the Judge's 1st, 2nd, 3rd and 4th findings of fact.

There is, however, no exception whatever to the Judge's 5th finding of fact, which, p. 12, was "that at the time the said property was so seized and attached it was the property of the plaintiff and not subject to such seizure or attachment."

Error is also alleged in the conclusion of law that the property was wrongfully taken and detained by defendant from the possession of plaintiff for the reason that there was no evidence to justify the finding of fact upon which said conclusion of law rests: and also in ordering judgment for plaintiff and against defendant, on the ground that the evidence was insufficient to warrant the findings of fact and conclusions of law on which the order is based; and, further, because the order, judgment and findings of fact and conclusions of law are,

each and all, contrary and against the evidence, in the six particulars stated, pp. 106–7.

Second.

The only questions presented on this appeal are those hereinafter discussed.

And as to these we submit the following points:

First Point.

The error first assigned, p. 101, was unfounded, to wit: that the Court erred in refusing to sustain the objection made by defendant to the introduction of the power of attorney offered by plaintiff. That power of attorney appears at p. 22–4.

(*a.*) It was duly executed by the principal under his hand and seal, and its formal execution was duly acknowledged by him before a Notary Public of the County, p. 24; And according to the statutes of Arizona; Chap. 40, Section 5: Chap. 42, Sections 3–8: 27 29: Bashford's Laws of Ariz., p. 349: 360–1: 363–4: Hoyt's Laws of Ariz.: pp. 372: 380–1: 383: 384, it was thereupon entitled to be recorded and read in evidence.

(*b*) It was clearly competent, in substance. Plaintiff's title to the goods in question upon the trial depended upon the assignment already, pp. 16–18, produced and proved to the Court, and which was executed by the principal through the attorney named in this power of attorney.

Second Point.

The error secondly assigned, p. 101, was unfounded, to wit ; that the Court erred in permitting the articles of agreement of the partnership between Lord & Williams Company to be read in evidence against defendant's objection.

(*a.*) The formal execution of this paper was duly proved by plaintiff Cullum as a witness, p. 21.

(*b.*) It was clearly competent to prove the existence and partnership relations of the parties who made the assignment to plaintiff under, which he claimed the goods in question, and whose title to and possession of such goods, when transferred to himself, he was asserting in this suit.

Point Third.

The error thirdly assigned, p. 101, was unfounded, to-wit ; that the Court erred in admitting in evidence the assignment made by Lord & Williams Company to plaintiff Cullum, against defendant's objection. That assignment appears, pp. 30-5.

(*a.*) Its formal execution by all the parties thereto was duly acknowledged by them before a Notary of the County, pp. 33-4.

(*b.*) It was the deed transferring to the plaintiff the title to the property he claimed, and was obviously competent as evidence.

Point Fourth.

The Errors assigned as 4th and 5th, p. 101–2, were untenable.

They are founded upon the denial of the motions to strike out the entire testimony of the plaintiff, on the ground of variance between the allegations of the complaint and the testimony, and for a non-suit which were made at the close of plaintiff's testimony, and denied, pp. 70–1; The contention of defendant being that the plaintiff, who was an assignee, could not institute the action in his personal capacity.

No doubt, this claim of defendant was the real ground for the objections referred to in the errors assigned as 1st, 2nd and 3rd.

It is submitted that the decisions of the Court admitting these documents, and overruling the objections of variance, and denying the non-suit, and holding that plaintiff might sue in his personal capacity, were in all respects correct.

I.—Such is the direct result of the assignment, pp. 30–3, under which the plaintiff held the property in question.

By that instrument such property was transferred to him absolutely, to be sold, disposed of and converted into money: no doubt, for the purposes and trusts specified in the instrument. But still the alienation was complete, both to the assignee and his vendees. The right the duty and the power to sell and dispose of the property and convert it into money were absolute in him. While the trust accompanied the estate in his hands, and was an ear-mark on all the property for the benefit of the *cestuis que trust*, still their claim to and interest in the property conveyed were only in such residue of the moneys arising from sales and collections as might remain after payment of the just and

reasonable expenses, costs and charges of executing the assignment and carrying it into effect, including the lawful compensation of the trustee for his services in executing the trust. The Assignee could on sale give perfect title to such assets as he sold without aid from or release by any creditor. His title was as perfect as that which this Court has repeatedly declared to be vested in an executor, upon appointment, to the personal estate of the testator.

Griffith *vs.* Frazier, 8 Cranch, 9: 24;
Kane *vs.* Paul, 14 Pet., 33: 40.

He held as trustee for the purposes of the assignment, but he held the legal title in all the chattels of the assignors. For the purposes of administering such chattels, he was as much the legal proprietor thereof as were the assignors prior to the assignment. He could be divested of them by no act except his own.

II.—The present action was simply an action at law for a wrong done to the property thus transferred to plaintiff after its transfer, and while still in his possession, and before it could be sold or converted into money or any residue after the payment of costs and expenses could arise, in or to which the creditors might lay claim. And it was an action which accrued to the plaintiff the moment the possession of the property was interfered with: which it was the plaintiff's duty to bring and prosecute with diligence: which would be barred by the lapse of time creating the statutory limitation, and the failure to bring and prosecute which with diligence would no doubt have rendered the plaintiff liable individually for the value of the property wrongfully taken from him.

McQueen *vs.* Babcock, 41 Barb., 337.

III.—There was no equitable right whatever in any

of the *cestuis que trust* under the assignment in question, which, on the committing of defendant's wrongful act of seizing the property could be enforced, defended, recognised, protected or pronounced, either by joining them as co-plaintiffs with the assignee, or in describing in the Summons and Complaint the assignee as their trustee. As is said by Chitty (On Pleading, Vol. 1, p. 3), "It would be impossible, consistently with the common principles of jurisprudence, to exclude the power of the trustee to sue in respect of his legal right": * * * the *right of action at law* has therefore been wisely vested solely in the party having the strict *legal* title and interest, in exclusion of the mere equitable claim."

Applying to the case at bar the principles laid down by this Court, per Field, J., in Coal Co. *vs.* Blatchford, 11 Wall: 172: 177, plaintiff was here the real prosecutor of this suit. The title and the possession of the property in suit had been transferred to and vested in him. He had acquired and possessed the right to use every remedy appropriate to any interference with or violation of his rights of proprietorship whether as to title or possession. The adoption of every such remedy rested solely in his option and discretion. So long as he did not refuse to discharge the trusts reposed in him other parties were not authorized to institute or prosecute any action or proceeding for any violation of his rights or to exercise any control over such proceedings as he might institute or prosecute.

See also McQueen *vs.* Babcock, *supra.*

IV.—Nor was any right of defendant lessened or impaired because plaintiff brought the action in his individual and not his representative capacity.

The only conceivable effect upon the rights of defendant which the bringing of the action in that form can be claimed to have had, would be in its effect upon

some evidence offered by defendant, or objected to by him when offered by plaintiff.

No evidence whatever, elicited or sought to be elicited on the part of the defendant or offered by plaintiff and objected to by defendant, turned or could have turned upon the question whether the plaintiff was or was not in the pleadings described as an assignee.

1. It is entirely clear that any admissions or declarations made by plaintiff inconsistent with his right of action, could have been given in evidence against him with full force and effect, when the suit was brought by him individually: even were the rules of the old practice still existing, and were the action brought by plaintiff as the nominal party to a contract, and his interest was shown to be merely nominal, and the entire beneficial interest was shown to be vested in other persons as the real parties in interest.
Bauerman *vs.* Radenius, 7 D. & E. 663.

2. The value or effect of any acts or declarations of the assignors of plaintiff would not have been in any manner changed by calling the plaintiff on the record the assignee of their assets for the benefit of their creditors.

3. By such an appellation of the plaintiff on the record, defendant could not have derived any benefit from any admission or declaration of any of the *cestuis que trust.*

V.—But the case was expressly covered by the Code of Arizona, which provided, Chap. 48, Sec. 4, that every action should be prosecuted in the name of the real party in interest; and, Section 6, that "an Executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue without join-

ing with him the persons for whose benefit the action is prosecuted."

Bashford's Laws of Ariz., p. 388.
Hoyt's Do. Do. p. 409.

These provisions are adopted literally from the Code of Procedure of New York passed April 12, 1848.

Laws of New York for 1848, Chap. 379, p. 497 : 515 : Sections 91 : 93.

They appear in substantially the same language in all the subsequent revisions of the New York Code of Procedure.

See Code of Civil Procedure, Sec. 449, as amended by Act of 1877.

They have been generally adopted in other States, especially those in which the practice has been codified.

See 2nd Hittell's Codes and Statutes of Cal. 957, Secs. 10, 367, 10, 369.

Under all these statutes, it has been uniformly held that an executor, administrator, assignee or trustee, in an action of tort like the present, as well as in actions on contracts, even those made with the decedent, the assignor, &c. might sue in his individual capacity : that the words executor, trustee or assignee, if or when used, might be rejected as mere *descriptio personæ* : and that no right of set off could be affected by the use or omission of such a title.

In Mellen *vs.* Hamilton Fire Ins. Co., 5 Duer, 101, Mellin was assignee of a policy of insurance for the benefit of creditors. He sued in his own name, not adding the description of assignee. The Court, per Duer, J., say, (5 Duer, 102) : "The objections taken on the trial to * * * and to the right of the plaintiff to maintain the action in his own name, were properly abandoned on the argument before us. Where an action is brought by

a trustee, in whom the legal title is vested, it is certainly not necessary that the *cestuis que trust* should be made parties, either as plaintiffs or defendants, unless where the action is brought for the purpose of determining, or involves the determination of, their respective rights and interests under the instrument creating the trust."

The case was affirmed in the Court of Appeals, 17 N. Y. R. 609, the opinion of Duer, J., being adopted as the opinion of that Court, and re-printed at p. 615.

To S. P. is Lewis *vs.* Graham, 4 Abb. Pr. 106, where it was expressly said that it was not necessary to join the *cestuis que trust.* "Before the Code there was no necessity for joining them in such an action. The assignee had full power to collect such claims in his own name." And under the provisions of the Code of Procedure above referred to it was held clearly unnecessary to join them in any manner.

See also Wakeman *vs.* Grover, 4 Paige 23:
Christie *vs.* Herrick, 1 Barb. Ch. 254.

In Hoagland *vs.* Trask, 48 N. Y. 686, the action was in all respects like the present. The same precise positions were taken by defendant at the trial, and overruled. And the judgment was affirmed; the Court of ultimate appeal holding that an assignee for the benefit of creditors could maintain an action in his individual character to recover a claim due the assignor. He was not required to sue as trustee.

Ogden *vs.* Prentice, 33 Barb. 160.
Richardson *vs.* Mead, 27 Barb. 178:
Eastern Plank Road Co. *vs.* Vaughan, 14 N. Y. 546: 555:
Merritt *vs.* Seaman, 6 N. Y. 168:
Marie *vs.* Garrison, 83 N. Y. 14: 30.

In Western RR. Co. *vs.* Nolan, 48 N. Y. 513, held that trustees, in whom is the title to a trust fund, are

the proper parties plaintiff in an action to maintain and defend the fund against wrongful attack or injury tending to impair its safety or amount. Neither the *cestuis que trust* nor beneficiaries can maintain such action against a third person, except in case the trustees refuse to perform their duty, and then the trustees should be made parties defendant. And see Coal Co. *vs.* Blatchford, 11 Wall: 172: 177.

So; had the title of assignee been used in the complaint herein it would in no manner have affected or enlarged plaintiff's right of action: the recovery by the plaintiff being in that case still his recovery as an individual: the words added being regarded as mere *descriptio personæ*, and always liable to be rejected as such, if they impaired or affected any substantial right.
Litchfield *vs.* Flint, 104 N. Y. 543.
Merritt *vs.* Seaman, *supra*.
Stillwell *vs.* Carpenter, 62 N. Y. 639:
Beers *vs.* Shannon, 73 N. Y. 292.
Thompson *vs.* Whitmarsh, 100 N. Y. 35.
Buckland *vs.* Gallup, 105 N. Y. 453.
Bingham *vs.* Marine Bank, 112 N. Y. 661.

In construing the provisions of the Code of Arizona above set forth, these authorities will be received as applicable and controlling in all respects.

So far as these or any other authorities herein cited construe similar statutes, they are entitled to be followed as the decisions of Courts of great weight and authority.

So far as any of these decisions lay down rules of the common law, they are entitled to like respect. For the legislative authority of Arizona has provided that the District Courts, in addition to the powers conferred by statute, shall have power to proceed according to the course of the common law. Bashford's Laws of Ariz. p. 377, Sec. 21.

And they also provide that the common law of

England so far as not repugnant to or inconsistent with the Constitution and laws of the U. S or the Bill of Rights or laws of the Territory, "is hereby adopted, and shall be the rule of decision in all the courts of this Territory." *Ibid*, p. 524, Sec. 7.

Also Hoyt's Laws of Ariz, p. 397: 571.

VI.—But in the present case it was wholly unnecessary either to join as co-plaintiffs in the action the *cestuis que trust*, or to describe the plaintiff as representing them either directly or indirectly.

As this Court said in Tyler *vs.* Hand, 7 How., 573, 585, in reference to the orphan children of the Choctaw Nation, for whom Mr. Tyler, as President of the United States, &c., brought that action, any inquiry as to who, whether individually or collectively, were creditors of the assignors, or who by name or otherwise, were entitled to share in the net proceeds of the assigned estate, were wholly unnecessary to entitle the plaintiff to recover. The existence or non-existence of any such creditors formed no matter of defence whatsoever. Their rights, *inter sese*, or even the existence of creditors at all, could not be inquired into in the action. A surplus, if there were one, and the entire net proceeds, if there were no creditors, were held in trust for the assignors under the last clause of the assignment, pp. 32–33.

There was no individual or several interest, right or claim, of any individual beneficiary of the trust, or any interest, right or claim of all such beneficiaries, which could be litigated, or which any person had a right to litigate, or was bound to litigate in the present action.

Point Fifth.

The 6th ground of error assigned, p. 102, was wholly untenable.

This was that, as the Judge's findings of fact show that plaintiff held the property by virtue of the assignment to him, and as trustee for the purpose of paying the creditors of his assignors, such findings were insufficient to warrant or support the judgment in favor of plaintiff, because, at the time of levying the attachment by defendant, by virtue of which he took the goods, "no creditor of said firm had assented to said assignment, or become a party thereto in any way."

The answer to this alleged error is two-fold.

I.--It nowhere appears, in the findings, that "no creditor of the assignors has assented to the said assignment, or become a party thereto in any way." There is no allusion to that matter in the findings.

II.--It was not necessary for the creditors to be parties to, or to assent to the assignment, or to be apprised of it. In the case of a general voluntary assignment for the benefit of creditors without preference and without restrictions, like that in the case at bar, the law presumes the assent of the creditors to to the assignment for their benefit in the absence of proof of dissent.

Neilson *vs.* Blight, 1 Johnsons Cases 205.
Moses *vs.* Murgatroyd, Johns. Ch. R. 119: 129.
Nicoll *vs.* Mumford, 4 *id.* 522: 529.
Cunningham *vs.* Freeborn, 11 Wend. 240: 248-9: (though the rule may be different where, as in Massachusetts, there is no court of equity to enforce the execution of trusts in behalf of creditors. See cases cited 11 Wend. 248-9).
Brown *vs.* Minturn, 2 Gall. 557.
Lawrence *vs.* Davis, 3 McL. 177.
Fellows *vs.* Greenleaf, 43 N. H. 421.

Ths title of these assignors was divested from the time of the record of the assignment which had been accepted by the assignee, if not from the time of its acceptance before record.

Thrasher *vs.* Bentley, 59 N. Y. 649: S. C. 1 Abb. N. C. 39.

Van Hein *vs.* Elkus, 8 Hun, 516.

Point Sixth.

The 7th ground of error assigned was wholly untenable.

It was that there was no "evidence that at the time of the making of the said assignment there were any creditors of Lord & Williams Company, for whose benefit said assignment was made, and said Cullum claimed to hold said property."

I.—If this Assignment of Error means that the *findings show* that there was at the trial "no evidence" to the effect stated: we reply the findings show no such thing, but the very contrary. For the first finding expressly decides that on the date of the assignment the assignors, "being insolvent," made the assignment. And insolvency could not exist without creditors, and creditors unpaid.

II.—If the specification means that in fact there was, during the trial, "no evidence" to the effect stated, we reply:

(1.) As is hereinafter shown, that question cannot be inquired into on any appeal from this judgment, because there was no motion for a new trial in the trial Court.

(2.) The portions of the testimony set forth in the "Statement on Appeal" are full of proof of the existence of creditors of the assignors. Such "liabilities" are directly and positively asserted by the assignor Williams, at p. 92, &c.; where he speaks of the stopping of the concerns; the liabilities of both firms; their creditors; obtaining the consent of the creditors; &c.; &c.

Point Seventh.

Appellant's Assignment of Errors next specifies, p: 103–5, as error, "the insufficiency of the evidence to justify the findings of fact and conclusions of law," as to the first four findings of fact, upon the grounds specified severally as to those findings.

In reply, we submit that this Court cannot examine the questions here presented as to these four findings, or any similar questions as to any of the findings of fact: on two grounds.

I.—It would be a violation of every principle of justice and right for a Court of appeal to reverse or review findings of fact, without having before it *all* the evidence on which the trial Court acted in arriving at the facts found by it.

And this rule has been followed in practice. Moore *vs.* Tice, 22 Cal., 514.

(1.) It does not anywhere appear in the Record that the "Statement on Appeal and Amendments and Additions Proposed by Plaintiff and Accepted by Defendant" pp. 14–108, contains, or purports to contain, all the evidence given at the trial before Judge Fitzgerald, whether on the part of plaintiff or defendant.

(2.) In fact, it containsonly a very small portion indeed of the evidence given at the trial ; As appears by the certified copy of the evidence taken at the trial, in possession of the Attorney for the Appellee.

(3.) The same fact appears from the contents of the "Statement on Appeal" at various places.

Thus, p. 64, when plaintiff was recalled for cross-examination, defendants counsel, Mr. Morgan, asked him as follows, "Q., In your examination in this statement that you prepared, I find the following: 'Mr. Williams and Mr. Harlow informed me about five o'clock P. M,, to the effect that the Bank of California had sent their claim to attorneys here, who had called on them with others, and had threatened attachment suits, and they under advice of counsel, concluded to make assignments and requested me to accept the trust. In looking around they thought I was the most desirable and available person, owing to my experience in winding up several large estates, and my being familiar with the complications of the Indian contracts and having some knowledge of their business. Is that true?"

There is nowhere in the previous testimony as given in the statement, any reference whatever to this subject, direct or indirect. Proof had therefore been given on that subject, which is not contained in the appellants "statement on appeal."

So, at p. 66, plaintiff Cullum in the same cross-examination was asked, "Q. You have not paid a creditor of this estate a dollar, have you?" To which he replied, as the Statement on Appeal shows, as follows: "Yes, sir; as I stated yesterday."

Now, upon an examination of the testimony given by Mr. Cullum, pp. 16–28; 35–44; 48–52; 64–70, there appears no statement whatever that he had ever paid a dollar to any creditor of the estate, nor any reference to that subject.

The same result follows from the first question appearing on p. 66 in this cross-examination, thus: "Q. I thought *you said yesterday afternoon you* had nothing to do with Lord & Williams Company, and were not familiar with their business." No statement whatever on that subject appears previously in the "Statement on Appeal."

So, p. 94, Mr. Williams in reference to a difference with Harlow, said, p. 94: "It has been stated here before." And the subject had not been previously mentioned, according to the "Statement on Appeal."

So the statement of the assignment by Lord & Williams to Cullum, in the Judge's second finding of fact, p. 11, was evidently founded upon full proof of such assignment given at the trial, but omitted from the "Statement on Appeal" for the sake of brevity and economy. The same must be true of the last clauses of the first Finding of Fact, as to Lord's ratifying the assignment, &c.

II.—The appellant made no motion for a new trial in the trial Court. In the absence of such a motion, a decision thereon, and an appeal therefrom, neither the Supreme Court of Arizona, nor this Court can consider the question of the insufficiency of the evidence to justify the findings of the Court, or whether there was no evidence to justify the findings, or whether the findings were contrary to or against the evidence.

The statutory provisions of Arizona on that subject appear in Sections 194-198 of the Compiled Laws of Arizona. Bashford's Laws of Ariz., p. 415-6. Hoyt's Laws of Ariz., p. 438-9; Sections 197 and 198 being amended by Sections 5 and 6 of Chap. 48 of Laws of Ariz. for 1879; p. 71-2:

These statutes, as amended, are as follows, omitting parts of section 195, immaterial here.

"SEC. 194. A new trial is a re-examination of an issue

of fact in the same Court, after a trial and decision by a jury, Court or referees.

SEC. 195. The former verdict or other decision may be vacated and a new trial granted on the application of the party aggrieved, for any of the following causes materially affecting the substantial rights of such party:

* * * 6. Insufficiency of the evidence to justify the verdict or other decision; or that it is against the law; * * *

"SEC. 196. When the application is made for a cause mentioned in the first, second, third and fourth subdivisions of the last section, it shall be made upon affidavit; for any other cause it shall be made upon a statement prepared as provided in the next section.

"SEC. 197. The party intending to move for a new trial shall give notice of the same as follows: When the action has been tried by a jury, within five days after the rendition of the verdict; and when tried by a commissioner, referee, or by the Court, without a jury, within ten days after receiving written notice of the filing of the findings of the commissioner, referee, or Court, when written findings are filed by the Court, or of the rendering of the decision of the Court when no findings are filed, provided, the decision be rendered in open Court, and if rendered at vacation, then within ten days after receiving written notice of the filing thereof; and when amendments are filed to remedy defects in the findings, within ten days after receiving written notice of the filing of such amendments. The notice shall state generally the grounds upon which the motion will be made. Within ten days after giving such notice, or within such further time as the Court or Judge thereof, or Court Commissioner may, by order, grant, the said party shall prepare and file with the clerk the affidavit or statement, or both, required by the last section. If

no statement or affidavit be filed within ten days after the notice, or within such further time as the parties may agree upon, or the Court, or judge thereof, or Court Commissioner may, by order, grant, the right to move for a new trial shall be deemed waived. When the notice designates as the ground upon which the motion will be made, the insufficiency of the evidence to justify the verdict or other decision, the statement shall specify the particulars in which such evidence is alleged to be insufficient. When the notice designates as the ground of the motion errors in law occuring at the trial, and excepted to by the moving party, the statement shall specify the particular errors upon which the party will rely. If no specifications be made, the statement shall be disregarded. The statement shall contain so much of the evidence, or reference thereto, as may be necessary to explain the particular points thus specified, and no more. Such statement, when not agreed to by the adverse party, shall be settled by the judge upon notice. When settled by the Judge, the same shall be accompanied with his certificate that the same has been allowed by him and is correct. On the argument, reference may also be made to the pleadings, depositions, and documentary evidence on file, and the minutes of the Court. If the application be made upon affidavits, the adverse party may use counter affidavits on the hearing. Any counter affidavits shall be filed with the clerk, one day at least previous to the hearing. The affidavits and counter affidavits, or the statement thus used, or both of them in connection with such pleadings, depositions, and other documentary evidence, and minutes of the Court, as are read or referred to on the hearing, shall constitute, without further statement, the papers to be used on the appeal from the judgment, and also the order granting or refusing the motion for new trial. To identify the affidavits, it shall be sufficient for the judge or clerk to

endorse them at the time as having been read or referred to on the hearing. To identify any depositions, or minutes of the court read or referred to on the hearing, it shall be sufficient that the judge designate them in his certificate as having been thus read or referred to. The notice of intention provided for by this Section need not state the time when the motion will be made; but the agreement (argument) of the motion may be brought on by either party, at any time after the settlement of the statement, by giving five days' notice thereof in writing to the opposite party.

"Sec. 198. The application for a new trial shall be made at the earliest period practicable after filing the affidavit, or statement, or both, when both are to be used on the motion; and the court or judge granting or refusing a new trial shall state in writing the grounds on which the same is granted or refused."

The Code of Arizona further provides as follows: Bashford's Laws, p. 438; Hoyt's Laws, p. 462. "Sec. 349. An appeal may be taken to the Supreme Court from the District Courts in the following cases:

"1. From the final judgment rendered in an action or special proceeding commenced in those courts or brought into those courts from another court;

"2. From an order made granting or refusing a new trial, or which affects a substantial right in an action or special proceeding."

These provisions were adopted from the statutes of California, unchanged in all particulars affecting the present action.

See 2d Hittell's Codes and Statutes of Cal., pp. 1000——2, Sections 10, 656–10, 661. And by Section 10, 939; *ibid*, p. 1051, an appeal might be taken,

1. From a final judgment in an action, &c., * * *

"3. From an order granting or refusing a new trial."

The Courts of California have uniformly held under these statutes that an appellant cannot be heard upon the ground of the insufficiency of the evidence to justify the findings of the Court, unless, in the manner and within the time prescribed by these statutes, he made a motion for a new trial in the District Court. and on the denial thereof has in due time appealed from the order denying the new trial.

In Dewey *vs.* Bowman, 8 Cal., 145, it had been held that in *equity* causes no motion for a new trial was necessary.

But that case was frequently disapproved of, and was finally expressly overruled.

Riddle *vs.* Baker, 13 Cal., 295;
Duff *vs.* Fisher, 15 Cal., 375;

where it was held that in order to obtain a review of the facts, the objections to the verdict of a jury in an *equity* case must be taken advantage of by a motion for a new trial. The Court said that the statute appeared to them to apply to *all* cases, whether of legal or equitable cognizance, and that the verdict could be reviewed "only by a motion for a new trial."

In Dooling *vs.* Moore, 20 Cal. 141, where there were appeals both from the judgment and the order for the new trial, but the latter was not taken in time; *held*, that the court could only consider the questions arising upon the appeal from the judgment. And to S. P. is Hihn *vs.* Peck, 30 *id.* 280.

See also Carpentier *vs.* Williamson, 25 Cal. 154: 158.
Ellis *vs.* Jeans, 26 *id.* 272.
Allen *vs.* Fennon, 27 *id.* 68.
People *vs.* Banvard, 27 *id.* 470: 475.
Carpentier *vs.* Gardiner, 29 *id.* 160.
Racouillat *vs.* Rene, 32 *id.* 450: 453.
Reed *vs.* Bernall, 40 *id.* 628.
Rycraft *vs.* Rycraft, 42 *id.* 444.

City of Stockton *vs.* Creanor, 45 *id.* 247; where the court said that the objection of the insufficiency of the evidence to sustain the decision or finding "cannot be presented by means of a statement on appeal, nor can it be considered on an appeal from the judgment."

These decisions of the Courts of California have been expressly adopted by the Supreme Court of Arizona. Frederico *vs.* Hancock, 1 Ariz. 511; where the cases from 18 and 27 Cal. above referred to are cited and expressly followed; the Court saying: "The findings of the Court below will not be reviewed on appeal, unless there was a motion for a new trial. * * * No motion for a new trial having been made, the findings are conclusive as to the facts."

An apparently similar statute in Nevada has received a similar construction in the Supreme Court of that State.

Cooper *vs.* Mutual L. I. Co., 7 Nev. 116: 120.

Point Eighth.

But if the Court could consider the sufficiency of the evidence to sustain these four findings of fact, it would be found that the evidence set forth in the Statement on Appeal was sufficient in all respects to warrant the findings.

It may be that there is a clerical error (pointed out on p. 104 in sub. D.), either in the first finding of fact, or in the printing at p. 33 of the signatures to the assignment in question. The finding states the assignment to have been executed in the firm name by "Williams," and signed by Williams and Harlow individually. The signature, p. 33, appears to be that of the firm by Harlow,

and not by Williams. But this is obviously a simple clerical error, and wholly immaterial for all the purposes of the appeal Whether the firm name was signed by Williams or by Harlow can make no difference. It was by one or the other, and both signed in their individual capacity, and the other partner signed individually by his attorney, Harlow.

If the specification in subdivision A of the objection to the first finding of fact, p. 103, may be considered as raising the question apparently sought to be raised in the Court below, whether the partnership of the Lord & Williams Company existed, because while Lord & Williams were to furnish, and did furnish, the stock or capital, Harlow was only to contribute his personal services in the management of the business of the firm: We submit that it is too plain for argument, or to require or justify the citation of authorities, that a partnership was formed and did exist between these parties on and after March 1, 1881.

It is the very case of the appellant that there was such a firm as that of "Lord & Williams."

Every paper in the Thompson suit, pleaded and put in evidence as the justification which shall defeat plaintiff's action, proceeds against "C. H. Lord and W. W. Williams, partners doing business under the firm name and style of Lord and Williams, defendants": pp: 72: 73: 74: 76: 78: 79: 81: 85: 88.

And Thompson's complaint, pp: 81–5, avers, twice, on his oath, the fact of such partnership.

Now, by the instrument of March 1, 1881, signed by all the three persons, it is agreed, "that the said Lord and Williams have this day and date *taken into partnership* the said C. E. Harlow, under the following conditions": All of which are such as are common in cases of copartnership, and are evidently designed to protect, preserve and promote the interests of copartners.

The agreement provides for a specified "capital stock" which the members of the pre-existing firm shall contribute. It provides that " in case said Harlow shall add any cash io the capital stock, he shall receive ten per cent. interest per year."—And as there is neither pretence nor proof that all the testimony taken at the trial is set out in this record, there can be no contention on this argument that Harlow did not contribute in cash material sums to the capital of the new concern.

The agreement also provides that the profits and losses which may arise in the business to which Harlow is thus admitted shall be shared and borne by the three partners in certain specified proportions.

It is then further provided: "In this contract it is distinctly understood by the parties interested that the partnership only pertains to that of merchandising, and has no connection in any shape or manner with any business the said Lord and Williams may have jointly or severally outside."

It is clear on the proofs in the record that, on the execution of this Agreement, the new concern was launched and carried on in accordance with its provisions. Harlow took immediate and entire charge of it as a merely mercantile firm. It took a new and distinct firm name. It put up new signs. It published its own advertisements. It opened and kept a new set of books. On them it was charged, and "Lord and Williams" were credited, with the value of the stock of goods then on hand. The old firm continued its business of bankers. And the new firm dealt with it, like any other of its customers and dealers, by making deposits with them, and drawing checks against the same: accounts of such dealings being regularly kept in due form, by each of the firms with the other.

How long would any Court hesitate to determine, what attorney would be willing to deny, that the relationship here created was that of copartners: whether

the action was by those who had sold to or dealt with "Lord & Williams Company," or by one of the parties to this written instrument against the others, to recover for a breach of its provisions.

So, it is also too clear for argument that the agreement of March 1, 1881, forming the new firm of the Lord & Williams Company, did not dissolve or terminate the old firm of Lord & Williams. On the contrary, it recognized the same as still existing. And that firm continued thereafter in existence, doing its business, contracting its obligations, and carrying on all its functions as such firm.

Were not this the case, the obligations to the Bank of California upon the drafts of Lord & Williams on and paid by that Bank, on which the Thompson judgment was recovered, pp. 81–90, would seem to have been worthless.

Moreover: Even if the agreement of March 1, 1881, pp. 25–7, did not constitute or create the new firm of the Lord & Williams Company, and if the old partnership of Lord & Williams still continued the owners of or interested in the goods in question, still plaintiff was entitled to recover in this action, notwithstanding the justification under the Thompson attachment. And the present judgment must be affirmed.

Because, if for any reason he were in error in claiming that the title and proprietorship and the possession of the goods in question were vested in the Lord & Williams Company, then the same must have remained in the members of the old firm of Lord & Williams; and must, therefore, have passed from them to Cullum, their assignee, under their assignment of October 25, 1881, mentioned in the Judge's second finding of fact, p. 11.

It is clearly found that on the day of the date of the two assignments, and three days before the issuing or levying of the Thompson attachment, Cullum as assignee claimed and took pos-

session of the property mentioned in the Complaint. Even if he were in error in claiming the possession under the one assignment, when he was entitled to it and ought to and might have claimed and taken it under the other, that error in law, merely relating to the precise nature and ground of his claim, but not narrowing, impairing or affecting the fact, nature or extent of the claim itself, is no reason for reversing the judgment appealed from.

So, too, if there be anywhere in these multitudinous but somewhat vague Assignments of Error and Grounds for the Appeal, the claim or point that in Arizona, there was a lack of power in the entire firm of assignors to make the assignments proved at the trial, or in a portion of them to make the same as made, by the act of those present, the execution by the attorney in fact, duly constituted in writing, of the copartner then absent and ill, and the subsequent ratification by him at the earliest opportunity; we reply:

That by the common law of England, duly adopted and made the common law of Arizona by the legislative authority thereof, the power to create such a trust existed, and was duly carried into effect by the two instruments of act. 25, 1881.

The power of debtors in this country to create such a trust at the common law, and the power of one partner to act for the others in so doing, would seem to follow from the principles laid down by Marshall, Ch. J., in Harrison *vs.* Sterry, 5 Cranch 289: 300; although that case was the case of a transfer by the resident partner only of a portion of the assets of the partnership, consisting only of things in action, and made for the purpose of obtaining further credit, and securing future as well as past advances.

The common law power thus to assign is perhaps best expressed by the Court of Errors of N. Y. in Grover *vs.* Wakeman, 11 Wend. 187, 194, thus: "It is perfectly settled, both in England

and in this country, that a debtor in failing circumstances has a right to prefer one creditor or set of creditors to another, in all cases not affected by the operation of a bankrupt system. He may assign the whole of his property for the benefit of a single creditor, in exclusion of all others; or he may distribute it in equal proportions, either among a part or the whole of his creditors. No matter how or upon what principle the distribution is made, if the debtor devotes the whole of his property to the payment of just debts, neither law nor equity inquires whether the objects of his preference are more or less meritorious than those for whom he has made no provision. 3 Maule & Selw. 371. 4 Mason, 210. 5 T. R. R. 235. 6 *id.* 152. 8 *id.* 521. 4 East 1. 2 P. Wms. 427. 1 Atk. R. 95, 154. 2 Johns. Ch R. 283. 3. Johns. R. 71. 5 *id.* 385. 1 Binn. 502. 10 Mod. 489. 5 T. R. 424. 15 Johns. R. 583. 5 Cowen, 547."

See also

Litchfield *vs.* White, 3 Sanf. S. C. R. 545: aff: 7 N. Y. 438.

Curtis *vs.* Leavitt, 15 N. Y. 9: 132.

Leavitt *vs.* Blatchford, 17 *id.* 521: 537.

Dunham *vs.* Whitehead, 21 *id.* 131.

A general assignment made by an insolvent for the benefit of his creditors is a private trust based on contract, is irrevocable, and must be strictly followed.

Platt *vs.* Adams, 7 Paige 615: 641–2.

Murray *vs.* Judson, 9 N. Y. 73

People *vs.* Chalmers, 1 Hun. 683: aff: 60 N. Y. 154.

Thrasher *vs.* Bentley, 59 N. Y. 649: S. C. more fully, 1 Abb. N. C. 39; where, of an assignment attacked as void because certain requirements of a law passed in 1860 touching the manner of executing such an assignment had not been fully complied with, Folger J. said, p. 43: "The Act

of 1860 does not give the right to make an assignment in favor of creditors, with or without preferences. The right exists at common law, and if exercised honestly, and with no design to hinder, delay or defraud creditors, does not require the Act of 1860 to warrant it. The Act of 1860 is a statute, not of creation, but of direction. It recognizes the existence of the power in the citizen to make an assignment of his property to trustees, for the benefit of his creditors; and does no more than prescribe the mode in which the power shall be used, and furnish some safeguards against abuse."

Syracuse, &c. RR. Co. *vs.* Collins, 57 N. Y., 641 : S. C., 1 Abb. N. C. 47.

Matter of Lewis, 81 N. Y. 421.

So, the execution of these assignments on behalf of both firms was perfect; they being executed by the resident partners, in their own individual names and in the name of the firm; and the papers being executed, on behalf of the partner, who was absent and ill, by his attorney in fact duly constituted in writing; and the assignments being ratified by the absent partner at the earliest opportunity; and the assignments being made without preferences, and in an extraordinary emergency.

It is therefore unnecessary to examine the authorities on this subject.

The same may, however, be consulted by referring to Burrill on Assignments 3d Edition, Sec. 86, sub V., Sec. 87, and authorities cited. The same fully sustain those assignments, had there been no act of the absent member, through his attorney, Harlow.

Point Ninth.

It is proper to call the attention of the Court again to the fact that, while the first four findings of fact are attacked in the specifications of error, no objection whatever is made to the Judge's fifth finding of fact, p. 12, "that at the time the said property was so seized and attached, it was the property of the plaintiff, and not subject to such seizure or attachment."

While that finding stands unattacked for error, it is difficult to see how any appellate Court can review or reverse the judgment.

Point Tenth.

The assignment at p. 106 of error in the conclusion of law, and in ordering judgment for the plaintiff, are disposed of by the considerations above set forth.

As has been already shown, this Court cannot, when no motion for a new trial was made in the trial Court, inquire whether there was evidence to justify the findings of fact on which the Court's conclusion of law rests; or whether the evidence was insufficient to warrant the findings of fact and conclusions of law; or whether the order and judgment and findings of fact and law were contrary to the evidence in the particulars stated in subdivisions A to F., p. 106–7.

And that this Court, in case like the present, "cannot consider the testimony." See Hecht *vs.* Boughton, 105 U. S. 235 : 236; Stringfellow *vs.* Kane, 99 U. S. 610.

Point Eleventh.

It will be observed, from the entire case, that the attachment suit of Thompson *vs.* Lord & Williams, which is pleaded as a justification and defence in the present action, and the appeal to the Supreme Court of Arizona, and the successive appeals to this Court, are parts of an attempt by the creditors of a portion of the members of the firm of Lord & Williams Company to appropriate the assets of that firm to the payment of debts not contracted by that firm, but by some members thereof only, and in clear violation of the well recognized equity that the assets of a partnership shall be applied first to the payment of the debts contracted or owing by it, before any portion thereof can be applied to the payment of individual debts of either or any of the members of the partnership.

Point Twelfth

The judgment appealed from should be affirmed, with costs.

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